RECORD AND BRIEFS

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No. _____

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of California enacted a law called the "Reproductive FACT Act." The State admits its purpose is targeting "crisis pregnancy centers" based on their viewpoint that "discourag[es]" abortion. The Act forces pro-life religious licensed centers to post notices that encourage women to contact the State to receive information on free or low cost abortions. The Act also burdens pro-life religious unlicensed centers' speech by requiring them to place extensive disclaimers in large fonts and in as many as 13 languages in their ads, which significantly burdens their ability to advertise. But the Act exempts most other licensed medical and unlicensed non-medical facilities, such as abortion providers, hospitals, and other healthcare facilities, as well as federal health care providers. The Ninth Circuit candidly admits that it upheld the Act amidst a "circuit split" with decisions by the Second and Fourth Circuits over how to scrutinize regulations of speech by medical professionals on controversial health issues. The ruling also conflicts with a recent decision by the Eleventh Circuit. The question presented is:

Whether the Free Speech Clause or the Free Exercise Clause of the First Amendment prohibits California from compelling licensed pro-life centers to post information on how to obtain a state-funded abortion and from compelling unlicensed pro-life centers to disseminate a disclaimer to clients on site and in any print and digital advertising.

PARTIES TO THE PROCEEDING

Petitioners are National Institute of Family and Life Advocates, d/b/a NIFLA, a Virginia corporation; Pregnancy Care Center, d/b/a Pregnancy Care Clinic, a California corporation; and Fallbrook Pregnancy Resource Center, a California corporation.

Respondents are Xavier Becerra, in his official capacity as Attorney General for the State of California, Thomas Montgomery, in his official capacity as County Counsel for San Diego County; Morgan Foley, in his official capacity as City Attorney for the City of El Cajon, CA; and Edmund D. Brown, Jr., in his official capacity as Governor of the State of California.

CORPORATE DISCLOSURE STATEMENT

National Institute of Family and Life Advocates, Pregnancy Care Center, and Fallbrook Pregnancy Resource Center, are non-profit corporations with no parent corporations. The corporations have no stock; accordingly, no public corporation owns 10% or more of their stock.

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INTRODUCTION

California enacted the Reproductive FACT Act ("the Act") with the stated purpose of targeting pro-life "crisis pregnancy centers" based on their viewpoint that "discourage[s]" abortion. Appendix ("App.") 7a. Petitioners are religiously-motivated non-profit centers that work to help women make choices other than abortion. The Act forces licensed pro-life medical centers to post notices informing women how to contact the State at a particular phone number for information on how to obtain state-funded abortions, directly contradicting the centers' pro-life message. Those calling the provided number will be referred to Medi-Cal and Family Planning, Access, Care, and Treatment Program ("PACT") providers, including private abortion providers such as Planned Parenthood. *See* www.plannedparenthood.org/health-center/CA); www.familypact.org/provider-search-1. The Act also forces non-medical, unlicensed pro-life organizations to give extensive disclaimers that they are not a licensed medical facility in large font and in as many as 13 languages to clients on site as well as in their ads, both print and digital, including on their own Internet websites. This compelled speech requirement drowns out the centers' pro-life messages and discourages them from speaking through advertisements because California's voluminous required statements make ads cost prohibitive.

The Petitioners come in two categories, both covered by the Act. The first group of Petitioners are licensed medical facilities ("licensed centers") that provide medical services along with pro-life

information and non-medical assistance, including diapers and parenting classes. The second group of Petitioners are not licensed and thus do not provide medical services, but only information and non-medical support to women seeking alternatives to abortion ("unlicensed centers"). Both licensed and unlicensed centers operate according to their religious views opposing abortion.

California imposes this compelled speech only on centers that oppose abortion. The Act does not impose these compelled statements across the board, but uses broad exemptions to exclude health providers that provide or promote abortion or abortifacients. Therefore, the only ones forced by the State to speak these government messages are those who oppose abortion.

The Ninth Circuit's decision conflicts with this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health*, 564 U.S. 552 (2011), by refusing to apply strict scrutiny to content- or viewpoint-based regulations of speech, despite its finding that the Act is content-based. App. 22a. The decision below also conflicts with the central holding of this Court's decisions in *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), that restrictions on *pro bono* speech in a regulated profession triggers strict scrutiny. In upholding the compelled speech on non-medical centers, the Ninth Circuit's decision also straightforwardly conflicts with *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), and *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

The Ninth Circuit candidly admits that it upheld the Act amidst a "circuit split" over how to scrutinize regulations of speech by medical professionals on controversial health issues. App. 25a. The Ninth Circuit's decision squarely conflicts with a Second Circuit decision that struck down a mandate forcing pro-life pregnancy centers to speak about abortion, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014); with a Fourth Circuit ruling that invalidated a requirement that doctors provide certain information related to abortion, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); and with an Eleventh Circuit *en banc* decision striking down a content-based restriction on speech of medical providers regarding safety of firearms, *Wollschlaeger v. Governor of Florida*, – F.3d –, No. 12-14009, 2017 WL 632740 (11th Cir. Feb. 16, 2017).

Despite the Ninth Circuit's discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), the Act far exceeds the leeway this Court granted in *Casey* for states to require informed consent before performing an abortion. California imposes these statements outside the context of obtaining informed consent and even when no medical procedure occurs. And, because the law targets pro-life facilities, the compelled statements do not apply neutrally to everyone in the State whether they perform a particular medical procedure, as in *Casey*, or not.

The Act also violates the Petitioners' rights under the Free Exercise Clause, by forcing them to make statements contrary to, or that undermine, their pro-life religious convictions, while exempting other

medical and non-medical providers. This Court should grant review and reverse the decision of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 839 F.3d 823, and reproduced at App. 1a. The order of the Ninth Circuit denying rehearing and rehearing *en banc* is unreported but appears at App. 72a–73a. The District Court's opinion denying the motion for preliminary injunction is unreported but appears at App. 44a.

JURISDICTION

The Ninth Circuit entered its judgment on October 14, 2016. App. 1a. It denied a timely petition for rehearing *en banc* on December 20, 2016. App. 72a–73a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution is set forth in App. 74a.

The text of California's Reproductive FACT Act is set forth at App. 75a.

STATEMENT OF THE CASE

Factual Background

Petitioners are the National Institute of Family and Life Advocates (NIFLA), an organization with over 110 non-profit pro-life pregnancy center members in California, and two such centers in San Diego County, Pregnancy Care Center ("PCC") and Fallbrook Pregnancy Resource Center. App. 89a–90a. Because of the Petitioners' pro-life viewpoint, they seek to provide help and pro-life information to women in unplanned pregnancies so that they will be supported in choosing to give birth. *Id.* Petitioners, both licensed and unlicensed centers, provide all of their information and services free of charge. *Id.* Petitioners are all incorporated as religious organizations, and they pursue their activities based on their pro-life religious beliefs. *Id.*

Petitioners PCC and many of NIFLA's California member centers are licensed medical facilities that provide medical services, along with pro-life information and non-medical services. PCC provides licensed medical services free of charge and in furtherance of its pro-life religious beliefs. *Id.* About 73 of NIFLA's California member centers are similar to PCC in their medical status and activities. App. 89a. PCC is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory. App. 91a. Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider

consultation, and other clinical services. App. 91a–92a. Non-medical services provided by PCC include: peer counseling and education, emotional support, maternity clothing, baby supplies, support groups, and healthy family support. App. 92a.

Petitioner Fallbrook is an unlicensed center, and a nonprofit corporation that provides non-medical pregnancy-related information and services for free in furtherance of its pro-life religious beliefs. App. 92a. About 38 of NIFLA's California member centers are similar to Fallbrook in their unlicensed status and provision of only non-medical activities. App. 94a. Fallbrook provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothing, and baby items. App.93a. Fallbrook and similar NIFLA centers advertise for their provision of free information and services, including on the Internet. App. 102a–103a.

The California Reproductive FACT Act

The State of California admits that the purpose of the Reproductive FACT Act is to target the speech of pro-life centers, specifically, "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions," and that "often confuse [and] misinform" women. App. 7a. The legislative history contains no evidence that "crisis pregnancy centers" like Petitioners, actually "misinform" women. The Act does not require a showing that a center provides incorrect information

before the compelled statements apply. The Act imposes different requirements based on whether a pregnancy center is a licensed medical facility or an unlicensed center.

Licensed Centers – Required Statement

Pursuant to this purpose and justification, the Act requires licensed medical centers, such as PCC and NIFLA's licensed California members, to provide a notice to all clients stating that:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [phone number].

App. 80a. Those calling the provided number will be referred to Medi-Cal and Family PACT providers, including private abortion providers such as Planned Parenthood. *See* www.plannedparenthood.org/health-center/CA (listing Medi-Cal as a form of accepted insurance); www.familypact.org/provider-search-1 (listing a majority of Planned Parenthood's California clinics as Family PACT providers).

A "licensed covered facility" is defined as a:

> [F]acility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of

> Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy test, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

App. 79a. The Act contains two exemptions: "(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies," and "(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program ["Family PACT"]."App. 80a. Family PACT is the State's program of family planning and comprehensive "reproductive health care" providers. *See* CAL. WELF. & INST. CODE § 14132.

Participation in the Family PACT program is the method by which the State excludes all others but the pro-life centers from the Act's compelled statements. A center can avoid the compelled speech required by the Act if it joins Family PACT. But the Family PACT program provides "family planning services" that include "all FDA approved contraceptive methods and

supplies," which includes abortifacients. *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover. Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program. By tying the Act's exemption from the compelled speech requirements to agreeing to dispense all contraceptives, including abortifacients, the exemption effectively includes only centers that support California's pro-abortion policies. This forces only those centers that oppose abortion to speak the State's message in support of it.

Licensed covered facilities must post the disclosure in one of the following ways:

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.
>
> (B) A printed notice distributed to all clients in no less than 14-point type.
>
> (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

App. 80a–81a.

The notice must be provided "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." App. 81a. For San Diego County, where PCC and Fallbrook are located, "threshold" languages include Spanish, Arabic, Vietnamese, Tagalog and Farsi. A center in Los Angeles County would have to publish the government's statement in English and 12 additional languages.[1]

Unlicensed Centers – Required Statements

The Act requires unlicensed non-medical pregnancy centers, such as Fallbrook and similar NIFLA members, to post a notice to all clients that "the facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." App. 81a. The Act defines "unlicensed covered facility" as:

> [A] facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or

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[1] *See* State of California, Department of Health Care Services, "Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015," dated September 2016, *available at* www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf.

> prenatal care to pregnant women. (2) The facility offers pregnancy testing or diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

App. 79a.

The required notice for unlicensed facilities must be "disseminate[d] to clients on site and in any print and digital advertising material[] including Internet Web sites," "in English and in the primary threshold languages." App. 81a. "The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* The notices contained in all advertising material must be "clear and conspicuous," which "means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." App. 81a–82a.

Covered facilities that violate the law "are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense," and the Act's requirements are enforceable by the Attorney General, city attorney, or county counsel. App. 82a.

Governor Brown signed the Reproductive FACT Act into law on October 9, 2015. It went into effect on January 1, 2016.

Petitioners filed this action on October 13, 2015, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Coates-Snow Amendment, and 42 U.S.C. § 238n. Petitioners filed their motion for preliminary injunction on October 21, 2015, asking that the Act be enjoined prior to its January 1 effective date. The District Court denied the motion, App. 44a, and the Petitioners appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit panel, on October 14, 2016, upheld the District Court's ruling denying the motion for a preliminary injunction. *NIFLA v. Harris*, App. 1a.[2] Petitioners argued the Act is content-based. The Court admitted the law was "content-based," App. 22a, but concluded it was not required to apply strict scrutiny, as this Court held recently in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), because the law did not discriminate on the basis of viewpoint. The Ninth Circuit ignored this Court's direct refutation of that concept in *Reed* when it stated "a speech regulation targeted at specific subject matter is content based

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[2] The Ninth Circuit decision here also applies to two other lawsuits that challenged the Act's compelled speech provision solely for licensed facilities: *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No 15-17517 (9th Cir. 2016) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir 2016).

even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct at 2230. Additionally, the Ninth Circuit cited its own precedent as support for its decision to disregard this Court's opinion in *Reed*, stating "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny." App. 23a.

The Ninth Circuit also rejected Petitioners' arguments that the Act is viewpoint discriminatory because it targets licensed and unlicensed "crisis pregnancy centers" that "discourage and women from seeking abortions." App. 7a. The Act is not viewpoint discriminatory, the Ninth Circuit claimed, because "it does not discriminate on the particular opinion, point of view, or ideology of a certain speaker," App. 20a, and because "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." *Id.*

The opinion then pointed out that in regard to "abortion-related disclosure cases," App. 25a, "there is currently a circuit split regarding the appropriate level of scrutiny to apply." *Id.* The Ninth Circuit stated that all of the decisions rejected the standard of strict scrutiny for "abortion related disclosure cases," with the Fifth and Eighth Circuits adopting a "reasonableness" standard, and the Fourth Circuit adopting intermediate scrutiny. The Ninth Circuit held that (1) strict scrutiny was not appropriate for the review of this California law, App. 24a, 27a; (2) it could not discern any standard of review from this Court's decisions in *Planned Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007), App. 25a; (3) that it would use intermediate scrutiny to review the requirements imposed on the licensed centers, App. 28a–36a; and (4) the required disclosure imposed on unlicensed centers satisfies any level of scrutiny, App. 36a–39a.

Licensed Centers – Required Statement

The Ninth Circuit upheld the requirement that licensed centers post information explaining how to obtain a state-funded abortion, ruling it a constitutional regulation of professional speech. App. 34a. It found that the State has a substantial interest in "the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." *Id.* It also found that the Act "is closely drawn to achieve California's interest in safeguarding public health and fully informing Californians of the existence of publicly funded medical services." App. 34a–35a.

Unlicensed Centers – Required Statements

As to the unlicensed centers, the Ninth Circuit upheld the Act's requirement that each of them disseminate a notice saying it is not a licensed medical facility, with no licensed medical provider who oversees or directly provides the services at its facility. The Ninth Circuit upheld this compelled speech under any constitutional test. App. 36a.

Although the Ninth Circuit acknowledged that the unlicensed clinics "do not offer many of the medical services available at the licensed clinics," App. 36–37a, they do "offer[] educational programs," and also "give medical referrals for ultrasounds and sonographs." App. 37a. California has a compelling state interest, the Ninth Circuit ruled, "in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." *Id.* It added that State's interest was "particularly compelling" because of the Legislature's findings that some crisis pregnancy centers "often present misleading information to women about reproductive medical services." *Id.* The opinion did not address the Act's requirement that it disseminate the message in multiple languages.

On December 20, 2016, the Ninth Circuit denied rehearing *en banc*. App. 72a.

REASONS FOR GRANTING THE PETITION

Government compelled speech is a constitutionally suspect enterprise, especially when it occurs in non-commercial contexts, based on viewpoint-discriminatory purposes that interfere with discussions of controversial social issues, such as abortion.

This Court has explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly,

the Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995), quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (internal citation and quotation marks omitted).

But the State of California now forces licensed centers to communicate the government's message about state-funded abortions to everyone who walks in the door. The State, rather than using countless alternative ways to communicate its message, including its own powerful voice, instead compels only licensed facilities that help women consider alternatives to abortion to express the government's message regarding how to obtain abortions paid for by the State.

For unlicensed centers, California's compelled speech takes a different form. These centers, which offer free of charge to women in need such things as tangible support (e.g., diapers and baby formula) and counseling, now find it cost prohibitive to advertise their services. This is so because the Act requires them to provide the disclaimer that they are not a medical facility to clients on site, and it must also appear on any print or digital advertising, including on Internet websites. The notice must be in up to 13 different languages, placed in at least two locations on site, and the notice in the advertising material must be in a "clear and conspicuous" font. These burdensome requirements make ad so long that it is difficult, if not impossible, for unlicensed centers to

advocate their own pro-life message in most media, like bus or newspaper ads. In addition, these disclaimers force the unlicensed centers to begin their expressive relationship with an immediate unwanted or negative message that crowds out and confuses their intended message. The law effectively suppresses their speech based on its viewpoint opposing abortion.

The Ninth Circuit upheld this law with its speech-compelling requirements regarding licensed centers under an intermediate standard of review, even though the State admitted that the purpose of the law was to target pro-life centers because of their viewpoint opposing abortion. The Ninth Circuit excused this content-based and viewpoint discriminatory law as a permissible regulation of professional speech. This decision directly conflicts with precedent of this Court, as well as that of multiple Courts of Appeals.

I. The Ninth Circuit upheld the California law compelling speech from noncommercial entities that offer their services for free based on their pro-life viewpoint, in conflict with decisions of this Court and other circuits.

The Ninth Circuit's decision conflicts with rulings of this Court and other circuits that have limited governmental authority to compel speech in a content-based or viewpoint discriminatory manner. Compelled speech cannot be justified as regulation of a profession, as the Ninth Circuit ruled, when the licensed and unlicensed centers offer their services to

women for free, and where the compelled statements have nothing to do with informed consent for a medical procedure that the centers perform. Instead, this Act limits its application to those centers that would *not* recommend abortion or would *not* tell women how to obtain a state-funded abortion. Also, the Act discriminates based on viewpoint by targeting pro-life unlicensed centers, requiring them to disclose that they are not medical facilities, thus disparaging their abilities and resources to the very women they desire to help.

The Ninth Circuit's decision conflicts with decisions of this Court and other circuits on these important questions.

A. The Ninth Circuit's opinion conflicts with decisions of this Court on content-based and viewpoint discriminatory laws.

The Ninth Circuit admits the Act is facially "content-based." App. 22a. It requires licensed pro-life pregnancy centers to tell women: "California has public programs that provide immediate free or low-cost . . . contraception . . . and abortion," and to, "contact the county social services office at [insert telephone number]." App. 80a. Because the Act is content-based, the Ninth Circuit should have applied strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny ...."). But the Ninth Circuit refused to apply *Reed* to this case, and incorrectly applied intermediate scrutiny instead. App. 28a–36a.

The reason why the Ninth Circuit stated that it did not apply strict scrutiny under *Reed* is that it found the law to be viewpoint neutral, even though it is content-based. App. 19a–20a. But that makes no difference, according to *Reed*. This Court held that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct at 2230. The Ninth Circuit erred by not applying strict scrutiny.

Moreover, the Act is actually viewpoint-based and is therefore subject to strict scrutiny regardless. Yet the Ninth Circuit disregarded *Reed*'s definition of how to judge whether laws are viewpoint-based. *Reed* declares that a law can be content or viewpoint-based either "on its face or when the purpose and justification" are viewpoint-based. 135 S. Ct. at 2228. In addition to the Act being facially viewpoint-based, the State baldly concedes, that the "purpose and justification" of the Act is to target "crisis pregnancy centers," that is, centers whose "principal aim is to discourage or prevent women from seeking abortions." App. 7a. The purpose and justification of the Act, as conceded by the State, is clearly viewpoint-based.

The decision further conflicts with *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–65 (2011), where this Court struck down a Vermont law that prohibited "pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing," 564 U.S. at 562. This Court found, like the California Act here, that the Vermont statute was content-based because the Legislature made findings

targeting pharmaceutical manufacturers who bought this information to help them convince doctors to prescribe their drugs. The *Sorrell* Court stated that "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell v. IMS Health Inc.* 564 U.S. at 566 (2011) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

The Ninth Circuit evaded *Sorrell's* clear ruling by claiming that the Act requires a wide range of entities to speak its compelled statements and not "a narrow class of disfavored speakers." App. 21a. But that ignores the significant exemptions and limitations in the Act. It applies only to those entities whose "primary purpose is providing family planning or pregnancy-related services," App. 78a, and contains two large exemptions for clinics operated by the United States, and any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program ["Family PACT"]." App. 80a. (Family PACT is the State's program of family planning and comprehensive "reproductive health care" providers. *See* CAL. WELF. & INST. CODE § 14132.).

The Family PACT exemption shows that the Act targets centers that oppose abortion. In order to participate in Family PACT and get the compelled speech exemption, a center would have to agree to provide "family planning services" that include "all FDA approved contraceptive methods and supplies,"

including abortifacients."[3] Petitioners here, because of their pro-life religious beliefs, cannot in good conscience provide contraception they believe functions as abortifacients. However, entities who have no objections to these requirements can readily join Family PACT and get the exemption.

For example, virtually all Planned Parenthood centers in California are listed on the Family PACT website, www.familypact.org/Home/home-page, and are Medi-Cal providers, www.plannedparenthood.org /health-center/CA. The Family PACT program's requirements limit eligibility to those who support abortion. They are the only ones who can be exempted from the Act's compelled statements. Consequently, the Act's compelled speech requirements apply only to pro-life licensed centers that oppose the State's pro-abortion message.

Targeting licensed and unlicensed pro-life centers is clear viewpoint discrimination, contrary to what the Ninth Circuit ruled here.

B. The Ninth Circuit's ruling conflicts with decisions by this Court and the Fourth Circuit on whether regulations of pro bono professional speech are subject to strict scrutiny.

The Ninth Circuit decision conflicts with rulings of this Court and the Fourth Circuit: whether professional speech receives the protection of strict scrutiny, rather than intermediate scrutiny, if it is

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[3] *See* discussion page 14 *supra*.

conducted on a pro bono basis. App. 32a. Contrary to the Ninth Circuit, both courts have ruled that the regulation of professional speech is subject to strict scrutiny if that speech is offered for free.

In *In re Primus*, 436 U.S. 412 (1978), this Court held that even though the practice of law is a profession licensed by the State, regulations of attorney speech are subject to strict—not intermediate—scrutiny, if the attorney is offering her services pro bono for public interest purposes. *Id.* at 437–38 & n. 32. This holding applies to the licensed centers in this case. The *In re Primus* Court explained that "prophylactic" speech regulations can govern attorney speech made "for pecuniary gain," but "significantly greater precision" is required for regulations of attorneys engaged in public interest advocacy. *Id.* at 434, 438.

Similarly, in *NAACP v. Button*—which also dealt with restrictions on pro bono attorney speech—this Court held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 371 U.S. 415, 438–39 (1963). Consequently, "it is no answer" to First Amendment claims to say "that the purpose of [the law] was merely to insure high professional standards and not to curtail free expression." *Id.* at 439. "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.*

Following this Court's precedent, the Fourth Circuit—in a challenge to a professional licensing

ordinance—held that "the relevant inquiry to determine whether to apply the professional speech doctrine" is based on "whether the speaker is providing personalized advice in a private setting to a paying client." *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013). This case involved the challenge to a city licensing scheme for fortune tellers.

The Ninth Circuit cited *In re Primus* and *Moore-King*, but declared "[w]e reject this argument." App. 32a. It stated that pregnancy centers "have positioned themselves in the marketplace as pregnancy clinics." *Id.* But both the licensed and unlicensed centers charge no fee for their services and information, and do so to further their pro-life mission. App. 91a–92a. There is no relevant constitutional distinction between this activity and that of the ACLU's in *In re Primus*. If pro bono public interest services by professionals count as putting oneself in the "marketplace," it negates the holding of *In re Primus*.

In re Primus and *NAACP v. Button* protect the First Amendment rights of the licensed centers here because they offer their professional services for free. This Court should grant review because the Ninth Circuit's ruling on the licensed centers conflicts with *In re Primus* and *NAACP v. Button* that held that speech regulations of professionals offering services free of charge must meet strict scrutiny.

C. The Ninth Circuit's ruling conflicts with that of the Second Circuit on whether the State may compel pregnancy centers to recite specific disclosures promoting abortion.

The Ninth Circuit's ruling directly conflicts with a decision by the Second Circuit in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), regarding whether the government can force pregnancy centers to recite disclosures specifically promoting abortion, even under the intermediate scrutiny test. The Ninth Circuit incorrectly stated that *Evergreen* subjected the disclosures to strict scrutiny, App. 35a, but *Evergreen* did not decide whether strict or intermediate scrutiny applied, and instead held that the regulations struck down there would satisfy neither. 740 F.3d at 245.

The Second Circuit in *Evergreen* considered a New York City law that required pregnancy centers to recite several disclosures. One compelled disclosure stated whether or not the facility had licensed professionals ("the Status Disclosure"), another disclosure said the City encourages women to consult a licensed provider ("the 'Government Message"), and yet another disclosure required centers to say "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care' (the 'Services Disclosure')." *Id.* at 238.

The Second Circuit considered these three disclosures separately, *id.* at 246–51. It upheld the

Status Disclosure,[4] but struck down the other two required disclosures as violating the First Amendment.

The Second Circuit declared unconstitutional the Services Disclosure, reasoning that the "context" precluded it, namely, "a public debate over the morality and efficacy of contraception and abortion." *Id.* at 249. That court held that the "Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues," contrary to the First Amendment. *Id.* at 249–50. Notably, the court reviewed the Services Disclosure under both strict and "intermediate scrutiny," and concluded the disclosure is unconstitutional either way. *Id.* at 245. The court separately struck down the Government Message disclosure for "requir[ing] pregnancy services centers to advertise on behalf of the City." *Id.* at 250.

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[4] The Second Circuit in *Evergreen* upheld the Status Disclosure, which although similar to the provision here in California's Act that requires unlicensed centers to state that they do not have a licensed medical professional on staff and are not supervised by a licensed medical professional, 740 F.3d at 246–49, the New York City provision is distinguishable from the Act because it did not require notices in all advertisements in multiple languages, which renders advertisements cost prohibitive. Also, it is Petitioners' position that the Second Circuit, in upholding the New York City disclosure about medical licensure, did not correctly apply this Court's ruling on similar disclosures in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). See discussion *infra* pp. 37–42. Moreover, this portion of the *Evergreen* decision conflicts with the district court decision in *Centro Tepeyac v. Montgomery County*, 5 F.Supp.3d 745, 748 (D. Md. 2014). *See infra* n.5.

The Ninth Circuit rejected this analysis and, in so doing, created a direct conflict with *Evergreen*. The Act in this case lists the same items contained in *Evergreen's* Services Disclosure: abortion, contraception, and prenatal care. But it also states that California offers subsidies for those services, and tells women where to get them ("contact the county social services office.") App. 80a. Thus, the Act is more constitutionally burdensome than the Services Disclosure struck down by the Second Circuit, adding elements to *Evergreen's* Government Message by "requir[ing] pregnancy services centers to advertise on behalf of" the government. *Evergreen*, 740 F.3d at 250. The Ninth Circuit ruling directly conflicts with *Evergreen's* holding regarding the Services Disclosure, which survived neither intermediate nor strict scrutiny.

Furthermore, the Ninth Circuit mistakenly claimed that when the Second Circuit reviewed the Services Disclosure it "applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today." App. 35a. As mentioned above, this is incorrect. *Evergreen* expressly applied both scrutiny levels and held the Services Disclosure unconstitutional even "under intermediate scrutiny." *Evergreen*, 740 F.3d at 250. Notably, this makes it immaterial that the pregnancy centers in *Evergreen* were unlicensed while the medical centers here are both licensed and unlicensed. Both courts explicitly applied intermediate scrutiny. The Ninth Circuit upheld the compelled-speech law, whereas the Second Circuit held that it violated the First Amendment.

D. The Ninth Circuit's decision conflicts with rulings by this Court and the Fourth and Eleventh Circuits on the circumstances in which speech may be compelled or prohibited between physicians and patients.

The Ninth Circuit acknowledges that its ruling takes a position amidst "a circuit split regarding the appropriate level of scrutiny to apply" in "abortion-related disclosure cases." App. 25a.

1. This Court's Decision in *Planned Parenthood v. Casey* does not support the Ninth Circuit's decision.

Although relied upon by the Ninth Circuit, it is important to note that this Court's decision in *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), does not support the ruling here. *Casey* allowed states to require physicians to disclose certain items to women before an abortion, but only as part of the process of obtaining their informed consent regarding surgery, and pursuant to the state's interest in protecting unborn life. 505 U.S. at 881–83. This requirement served a particularized interest in ensuring that "relevant" information is provided to the patient so that a necessary step—informed consent for a surgical procedure—is actually obtained. *Id. Casey* did not give states *carte blanche* authority to force doctors to recite information regarding abortion outside the context of obtaining informed consent before a woman undergoes a surgical abortion. Here,

the Act requires the disclosure in a situation where the recommendation is not to have a medical procedure.

The information that the Act requires licensed centers to communicate has nothing to do with informed consent in the context of a surgical procedure like an abortion, which the centers do not perform, and nothing to do with nonsurgical medical procedures that a licensed center might actually perform, such as an ultrasound. The State mandates the licensed centers to disclose the required information to all patients whether they receive any service in particular, like diapers, pamphlets or baby clothes, or no services at all. In sharp contrast, a law regulating informed consent applies in a limited situation where a patient is considering and consenting to a surgery or some other medical procedure, and the information relates to that procedure.

Second, the Act does not require disclosures before all ultrasounds are performed. The Act exempts many facilities in California where ultrasounds occur, such as hospitals, doctor's offices, abortion clinics, and other places. App. 80a. The Act's definitions gerrymander all of those facilities outside its scope, even if they provide the same pregnancy-related services. *Id.* *Casey* did not empower states to single out facilities advocating a particular viewpoint against abortion that the State opposes, and coercively impose on those facilities compelled statements that tell women where to receive free or low cost state-funded abortions. The Act finds no

support from this Court's decision in *Casey*, because *Casey* is inapplicable.

2. The Ninth Circuit's decision allowing the government to require or ban speech in the context of doctor and patient discussions of controversial topics conflicts with rulings of the Fourth and Eleventh Circuits.

The Ninth Circuit ruling conflicts with those of the Fourth and Eleventh Circuits on what speech the government can impose or forbid in the context of abortion or other controversial issues. The Ninth Circuit's opinion claims to agree with the Fourth Circuit in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), but these two decisions are irreconcilable. *Stuart* struck down an informed consent law that required doctors to show women an ultrasound and describe the fetus before an abortion. *Id.* at 242. *Stuart* held that mere fetal facts have "ideological implications," because they all fall on one side of the abortion debate" and "promote[] a pro-life message." *Id.* at 242, 246. Therefore, the Fourth Circuit held the North Carolina law was unconstitutional.

If facts about fetal development "all fall on one side of the abortion debate," then information on how to obtain a state-funded abortion "fall[s] on one side of the abortion debate." Nonetheless, the Ninth Circuit's ruling here rejects the Fourth Circuit's approach in *Stuart*. The disclosure California requires has an unmistakable advocacy component. It requires pregnancy centers to tell women that

California has programs offering subsidized abortion, and urges them to "contact the county" for the information about them. App. 80a. But the Ninth Circuit improperly called this speech non-ideological, while saying the merely factual disclosure in *Stuart* "convey[ed] a particular opinion." App. 22a (quoting *Stuart*, 774 F.3d at 246). If telling someone how to get a free abortion does not convey a particular viewpoint on abortion, it is difficult to think of what does.

The Ninth Circuit further conflicts with the Eleventh Circuit, which recently rejected *en banc* the application of *Casey* in striking down a content-based restriction on the speech of doctors who desired to speak to patients about firearms. *Wollschlaeger v. Governor of Fla.*, –F.3d –, No. 12-14009, 2017 WL 632740 at *9. (11th Cir. Feb. 16, 2017). The Eleventh Circuit held that "State officials cannot successfully rely on a single paragraph in a plurality opinion of three justices" to justify content-based restrictions on the speech of medical professionals. *Id.*

The Ninth Circuit upheld an Act that requires licensed centers in California to post information on how to contact the county for a free abortion because it considered that requirement non-ideological. Such inconsistency is why this Court insists that "compelled statements of opinion" are constitutionally no different than "compelled statements of 'fact,' since either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797. This Court should grant review to reverse this ruling by the Ninth Circuit.

E. The Ninth Circuit's decision conflicts with decisions of this Court that invalidated efforts to compel speech by non-commercial, non-professional speakers.

The Ninth Circuit ruled that California may force unlicensed facilities to recite extensive messages even under the strict scrutiny test. App. 36a–39a. Under this Court's precedents, the strict scrutiny test should invalidate the Act's required statements for unlicensed centers, because the State has a greatly reduced interest in compelling disclosures from them.

In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), this Court struck down a North Carolina law that required professional fundraisers for charities to make various disclosures before they asked for donations. The Court applied strict scrutiny to declare unconstitutional these provisions. *Id.* at 796-98. One reason was that "the compelled disclosure will almost certainly hamper the legitimate efforts" of the speakers to advance their cause because they have to start the conversation with a disclaimer that may cause the listener to stop the conversation. "[T]he disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 800.

In Riley, this Court ruled that the First Amendment protected the speech of professional fundraisers. Here, unlike the situation with the professional fundraisers, no money changes hands, because the unlicensed centers offer their services for free. The unlicensed centers provide no medical

services, so it is unnecessary for them to say that no doctor is on hand to give women diapers and baby clothes, teach parenting classes, and talk about how the women can receive social support to give birth.[5]

The Act's regulation of unlicensed centers is incredibly burdensome. The required notice must be displayed in at least two places on site and "in any print and digital advertising material[] including Internet Web sites," not only "in English," but also "in the primary threshold languages." App. 81a. For San Diego County, where PCC and Fallbrook are located, "threshold" languages can include Spanish, Arabic, Vietnamese, Farsi and Tagalog. *See supra* note 1.

Additionally, the notice contained in an advertisement must be "in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language. App. 81a–82a. These language and size requirements make it cost prohibitive for unlicensed centers to run ads. For example, the cost of running an

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[5] A federal court invalidated a similar compelled speech law that required non-medical pregnancy centers to post signs stating that the center did not have a licensed medical provider on staff, among other disclaimers. *Centro Tepeyac v. Montgomery Cty*, 5 F. Supp. 3d 745, 748 (D. Md. 2014). The court found that the regulation was content-based and applied strict scrutiny. *Id.* at 754, 762–69. The court held that that "the critical flaw" in the law was the "lack of any evidence that the practices of [pregnancy centers] are causing pregnant women to be misinformed which is negatively affecting their health." *Id.* at 768. The law therefore was not narrowly tailored to a compelling government interest. *Id.* at 769.

advertisement for a non-profit corporation in the San Diego Union-Tribune in the Sunday print edition is $376.00 per column inch. *See* The San Diego Union-Tribune, GENERAL PRINT RATE BOOK, *available at* http://cdn.sandiegouniontrib.com/static/utsd/v1/pdf/general.pdf. Adding a statement that "Fallbrook is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services" *in 5 additional languages* could add several inches and hundreds (if not thousands) of dollars to the cost of each ad, a five-fold increase. In Los Angeles County, with 13 threshold languages, the costs would increase thirteen-fold. These burdensome language, font, and size requirements make widespread newspaper, and other, advertising cost prohibitive.

Internet advertising by the unlicensed centers also suffers under this compelled speech rule. It would be burdensomely expensive under this Act to run a small banner ad that states, "Pregnant? Need Help? [phone number]." Assuming the same average number of words for each of these required languages, the unlicensed Petitioners must add 145 words in a "clear and conspicuous" size and font on top of every five-word Google search ad. This would not be possible: as Petitioners testified in their complaint, it would crowd out or eliminate entirely advertising of their expressive enterprise. App. 100a. There is nothing narrowly tailored about this requirement. The Act's compelled speech effectively silences the unlicensed pregnancy centers' pro-life message.

The Ninth Circuit's decision also conflicts with this Court's decision in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), because the State lacked evidence why it needed to compel the unlicensed centers to disclose that they are not medically licensed facilities. *Brown* ruled "[t]he State must specifically identify an actual problem in need of solving ... and the curtailment of free speech must be actually necessary to the solution." *Id.* at 799 (internal citations and quotation marks omitted). The State's "evidence is not compelling" if it merely shows a correlation, not a "direct causal link," between the target of its regulation and the alleged harm. *Id.* at 799–800.

California's evidence supporting the Act is weaker than the correlations this Court rejected in *Brown*. It is nonexistent. The Ninth Circuit cited, and the State relies on, no studies showing that women are actually being harmed by unlicensed pregnancy centers. They advance no evidence demonstrating that if Petitioners recite the disclosures the law requires, the alleged harm will be alleviated. In fact, the Ninth Circuit and the State cite nothing but advocacy testimony by pro-choice organizations and the legislature vaguely declaring that pregnancy centers "often present misleading information to women about reproductive medical services." App. 37a. Such bald, unsupported assertions cannot meet this constitutional standard.

Targeting "misleading information" is even more dangerous than targeting "false" speech, because misleading is a term used when statements are not serious enough to be deemed false. Yet this Court

recently struck down even an attempt to punish admittedly false speech, *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). If a narrow ban on false speech failed in *Alvarez*, how much more does it violate the First Amendment for the Act to impose compelled speech on non-medical pro-life centers, innocent even of the "misleading" speech label?

Simply put, there is no compelling evidence that the Act's "curtailment of free speech," namely its required statements, is "actually necessary to the solution" of a real problem. *Brown*, 564 U.S. at 799.

The Act is not tailored (much less narrowly tailored) to eliminate "misleading speech." It applies without regard to whether a pregnancy center speaks anything "misleading." Rather, it applies prophylactically to centers that focus on pregnancy, offer "options counseling," or speak to pregnant women. Cal. Health & Safety Code § 123471. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801. A speech-regulating law must "eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Finally, the Ninth Circuit misapplied strict scrutiny by not applying the least restrictive means prong of that test. In *Riley*, this Court required the government to show it could not achieve its interest in another way:

> For example, as a general rule, the State may itself publish the detailed [information]. This procedure would communicate the desired information to the public without burdening [the] speaker with unwanted speech during the course of a solicitation.

Id. at 800. "Alternatively, the State may vigorously enforce its antifraud laws." *Id.*

Here the same principles apply. If the unlicensed centers are allegedly "misleading" women in some way about whether they are medical facilities, the State can vigorously prosecute the unlawful practice of medicine. *See* Cal Bus. & Prof. Code § 2052. Likewise, the State itself could advocate to women about the option of abortion. The Ninth Circuit did not require the State to disprove these, or any other, less restrictive alternatives. Its decision conflicts with *Brown* and *Riley*.

II. The Ninth Circuit resolved significant questions of free exercise doctrine in conflict with this Court's precedent.

The Ninth Circuit's determination that the Act is neutral under the Free Exercise Clause conflicts with this Court's determination that an ordinance impermissibly targets religion if its practical application affects a religious group and no others. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-37 (1993).

In *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), this Court ruled that a law that is neutral

and generally applicable does not violate the Free Exercise Clause. But this Act is not neutral or generally applicable because it exempts broad segments of the medical community that engage in many of the same activities as Petitioners here. The Act is drafted so as to apply only to entities like the Petitioners whose beliefs require them to oppose abortion. The Ninth Circuit skirts this analysis by stating: "The Act applies to all covered facilities." App. 40a. But it is within the definition of "covered facilities" where the targeting of religion takes place.

The Act defines its scope as applying only to facilities "whose primary purpose is providing pregnancy-related services." App. 78a. Thus, the Act does not apply to hospitals and clinics whose medical services cover a wide range of activities, even if they offer the exact same pregnancy services that pregnancy centers offer. The unlicensed facility definition exempts facilities that have "a licensed medical provider on staff or under contract." App. 80a.

And the Act does not apply to licensed clinics that are both Medi-Cal providers and Family Planning, Access, Care, and Treatment Program ("Family PACT") enrollees. App. 79a. This legislative requirement works to limit the Act's application to pregnancy centers that oppose abortion. Any center can avoid the Act's compelled speech requirements by joining both Medi-Cal and Family PACT. But in order to participate in the Family PACT program, a center must provide "family planning services" that include "all FDA approved contraceptive methods and supplies." *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

Licensed Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program because they would have to supply contraceptives they believe work as abortifacients.[6] Other facilities that have no objection to supplying all forms of contraception, including abortifacients, can escape the Act's compelled disclosures by participating in the Family PACT program, something the Petitioners cannot do consistent with their religious beliefs. Because the Act ties its exemption from the compelled speech to dispensing abortifacients, the Act's compelled speech ends up applying only to those centers that oppose abortion. "[T]he burden of the ordinance, in practical terms, falls on [pro-life pregnancy centers] but almost no others...." *See Lukumi*, 508 U.S. at 536.

As in *Lukumi*, the lack of neutrality is also shown by the "historical background" of the Act. *Id.* at 540. It is viewpoint-based on its face and also has a viewpoint discriminatory legislative purpose and justification targeting crisis pregnancy centers because their religious convictions require them to discourage abortion, which the State characterizes as supposed "[mis]information" with which the State disagrees. Like in *Lukumi*, the Act ends up covering only licensed and unlicensed centers that oppose abortion and seek to counsel women to choose a different path.

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[6]*See* www.familypact.org/provider-search-1.

III. This Case Offers a Clean Vehicle To Examine These First Amendment Issues.

This case presents a clean vehicle to examine these important First Amendment issues. The Ninth Circuit concluded that this case presented only issues of law, and there was no need for further fact finding, stating: "This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge." App. 16a. The law challenged in this lawsuit directly affects Petitioners, who asked the District Court and the Ninth Circuit to enjoin its enforcement against them. Returning this case to the lower court for further proceedings would not meaningfully improve the record.

Also, this is the only petition that includes both licensed and unlicensed centers as Petitioners. The Ninth Circuit decision here also applies to two other lawsuits that challenged the Act's compelled speech provision solely for licensed facilities: *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No 15-17517 (9th Cir. 2016) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir 2016). Because both portions of the Act apply to Petitioners, granting review would enable this Court to review both categories of compelled speech imposed by the Act.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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MARCH 20, 2017

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, a Virginia corporation, DBA NIFLA; PREGNANCY CARE CENTER, a California corporation, DBA Pregnancy Care Clinic; FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation,
Plaintiffs-Appellants,

v.

KAMALA HARRIS, in her official capacity as Attorney General for the State of California; THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; EDMUND G. BROWN, JR., in his official capacity as Governor of the State of California,
Defendants-Appellees.

No. 16-55249

D.C. No.
3:15-cv-02277-
JAH-DHB

OPINION

Appeal from the United States District Court
for the Southern District of California

John A. Houston, District Judge, Presiding
Argued and Submitted June 14, 2016
San Francisco, California

Filed October 14, 2016
Before: Dorothy W. Nelson, A. Wallace Tashima, and John B. Owens, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY*

Civil Rights

The panel affirmed the district court's denial of a motion for a preliminary injunction sought by three religiously affiliated non-profit corporations to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act.

The Act requires that licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California. Appellants alleged that the Act violates their fundamental rights, including their First Amendment

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

guarantees to free speech and the free exercise of religion.

As a threshold matter, the panel held that appellants' claims were constitutionally and prudentially ripe. Addressing the free speech claim, the panel concluded that the proper level of scrutiny to apply to the Act's regulation of licensed clinics was intermediate scrutiny, which the Act survived. With respect to unlicensed clinics, the panel concluded that the Act survived any level of scrutiny.

The panel also rejected appellants' arguments that they were entitled to a preliminary injunction based on their free exercise claims. The panel held that the Act is a neutral law of general applicability, which survived rational basis review. The panel concluded that appellants were unable to demonstrate a likelihood of success on the merits of their First Amendment claims.

COUNSEL

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OPINION

D.W. NELSON, Senior Circuit Judge:

The National Institute of Family and Life Advocates, et al. appeal from the district court's denial of their motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act). The Act requires that licensed pregnancy-related clinics disseminate a notice stating

the existence of publicly funded family-planning services, including contraception and abortion. The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California. Appellants allege that the Act violates their fundamental rights, including their First Amendment guarantees to free speech and the free exercise of religion.

We affirm the district court's denial of Appellants' motion for a preliminary injunction. For the free speech claim, we conclude that the proper level of scrutiny to apply to the Act's regulation of licensed clinics is intermediate scrutiny, which it survives. With respect to unlicensed clinics, we conclude that the Act survives any level of scrutiny. For the free exercise claim, we conclude that the Act is a neutral law of general applicability, and that it survives rational basis review. Appellants, therefore, are unable to show the "most important" factor under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008): likelihood of success on the merits. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

BACKGROUND

I. The FACT Act

The FACT Act was created for the stated purpose of ensuring that "[a]ll California women, regardless of income, . . . have access to reproductive health services." Assem. Bill No. 775 § 1(a). It was enacted after the California Legislature found that a great number of California women were unaware of the

existence of state-sponsored healthcare programs. *See id.* at § 1(a)–(c). These programs, which expanded under the Patient Protection and Affordable Care Act to include millions of California women, provide "low income women . . . immediate access to free or low-cost comprehensive family planning services and pregnancy related care." *Id.* at § 1(c); *see also* Assem. Comm. on Health, Analysis of Assembly Bill No. 775. Specifically, the Legislature found that:

> Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

Id. at § 1(b).

The Legislature also found that the ability of California women to receive accurate information

about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers (CPCs). CPCs "pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions" in order to fulfill their goal of "interfer[ing] with women's ability to be fully informed and exercise their reproductive rights." Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3. The Legislature found that CPCs, which include unlicensed and licensed clinics, employ "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Id.* There are approximately 200 CPCs in California. *Id.*

Because "pregnancy decisions are time sensitive, and care early in pregnancy is important," the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics unable to enroll patients in state sponsored programs to state the existence of these services. Assem. Bill No. 775 § 1(c)–(d).

Thus, as required under the Act, all licensed covered facilities must disseminate a notice (the Licensed Notice) stating, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the

telephone number]." Cal. Health & Safety Code § 123472(a)(1). The Act defines a licensed covered facility as "a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services," and that also satisfies two or more of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

Id. § 123471. The Act requires that the Licensed Notice be disclosed by licensed facilities in one of three possible manners:

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type. (B) A printed notice

> distributed to all clients in no less than 14-point type. (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.

Id. § 123472(a)(2).

The Act also covers unlicensed facilities. An unlicensed clinic is "a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services" and that also satisfies two of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

Id. § 123471(b). Unlicensed clinics must disseminate a notice (the Unlicensed Notice) stating, "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the

provision of services." *Id.* § 123472(b)(1). The Unlicensed Notice must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* § 123472(b). Information in advertising material must be "clear and conspicuous," and the onsite notice must be "at least 8.5 inches by 11 inches and written in no less than 48-point type, and . . . posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* § 123472(b)(2)–(3).

All violators of the Act "are liable for a civil penalty of five hundred dollars . . . for a first offense and one thousand dollars . . . for each subsequent offense." *Id.* § 123473(a).

II. Procedural History

Appellants are three religiously-affiliated non-profit corporations.[1] The National Institute of Family and Life Advocates (NIFLA) is a national organization composed of numerous pregnancy centers, 111 of which are located in California. Seventy-three of the centers are licensed by the State of California, and thirty-eight provide non-medical services. Pregnancy Care Clinic is a licensed clinic that provides medical services such as ultrasounds, medical referrals, and education on family planning. Its staff includes two doctors of obstetrics and

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[1] In addition to this appeal, this panel also heard argument in related cases *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15- 17517, __ Fed. Appx. __ (9th Cir. 2016), and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497, __ Fed. Appx. __ (9th Cir. 2016).

gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers. Fallbrook Pregnancy Center is an unlicensed clinic. It offers services such as free pregnancy tests that patients can take themselves, educational programs, and medical referrals. Fallbrook employs several nurses at its facility, and also contracts with a licensed medical provider for referrals for ultrasounds, which are provided in a separate mobile facility nearby. Prenatal sonographs are also offered by a contractor in a separate facility nearby.

Appellants are strongly opposed to abortion. None provide abortions or referrals for abortions. NIFLA's mission is to "empower the choice for life," and Pregnancy Care Clinic "provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion." Fallbrook believes "that human life is a gift of God that should not be destroyed by abortion.

On October 13, 2015, Appellants brought suit against California Attorney General Kamala Harris (the AG), California Governor Edmund G. Brown, Jr., County Counsel for San Diego County Thomas Montgomery, and City Attorney of El Cajon Morgan Foley[2] in the Southern District of California.

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[2] The district court's finding that the City Attorney of El Cajon is not a proper defendant was harmless error. The Act grants the City Attorney the power to enforce the Act. *See* Cal. Health & Safety Code § 123473. The City Attorney, therefore, is a proper defendant.

Appellants alleged that the FACT Act violates their First Amendment free speech and free exercise rights.[3] Appellants brought a motion for a preliminary injunction to enjoin enforcement of the Act prior to the full litigation of the action.

The district court denied Appellants' motion for a preliminary injunction. The court found that Appellants were unable to show a likelihood of success on their free speech claim. With respect to the Licensed Notice, the court held that the Act either regulated professional conduct subject to rational basis review, or professional speech subject to intermediate scrutiny, and the Act survived both levels of review. The court also held that the Act did not constitute viewpoint discrimination. With respect to the Unlicensed Notice, the court held that it withstood any level of scrutiny. In addition, Appellants could not show a likelihood of success on the merits of their free exercise claim because, the court held, the Act is a neutral law of general applicability which survived rational basis review.

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[3] Appellants' claims for relief are (1) Violation of the free speech clause of the First Amendment of the United States Constitution; (2) Violation of the due process clause of the Fourteenth Amendment of the United States Constitution (alleged by unlicensed clinics); (3) Violation of the free exercise clause of the First Amendment of the United States Constitution; (4) Violation of the Coats-Snowe Amendment, 42 U.S.C. § 238N (alleged by licensed clinics); and (5) Violation of the free speech clause of the California Constitution. Because Appellants brought their motion for preliminary injunction only under their federal First Amendment claims, we address only those issues in this opinion.

The court then explained that even though Appellants raised "serious questions going to the merits," *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011), they could not demonstrate that the other Winter factors weighed in favor of granting a preliminary injunction

STANDARD OF REVIEW

We review the grant or denial of a preliminary injunction for an abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). We review the district court's interpretation of underlying law de novo. *Id.*

ANALYSIS

I. Appellants' Claims Are Justiciable.

As a threshold matter, we must first decide whether Appellants' claims are justiciable. The County Counsel of San Diego argues that this action is not constitutionally ripe, and even if it were ripe, that we should decline to find jurisdiction for prudential reasons.

We reject these arguments.

A. Appellants' Claims Are Constitutionally Ripe.

"[T]he Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'"

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 1999) (en banc) (quoting *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). A plaintiff must face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," not an "alleged injury [that] is too imaginary or speculative to support jurisdiction." *Id.* (internal quotation marks and citation omitted). This Court has identified three factors to assess in deciding whether a case is constitutionally ripe: (1) whether plaintiffs have articulated a concrete plan to violate the statute in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement of the challenged statute. *Id.*

These factors allow for plaintiffs to bring pre-enforcement challenges to laws that they claim infringe their fundamental rights. *See id.* at 1137 n.1. Indeed, we have long recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief . . . . [p]articularly in the First Amendment-protected speech context[.]" *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (citation omitted); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

Appellants' claims are constitutionally ripe. Before the district court and this Court, Appellants have explicitly stated that they will not comply with the Act, even if enforced. Appellants have made this pledge of disobedience although they are aware that violators of the Act are subject to civil penalties. Cal. Health & Safety Code § 123473(a). The AG, moreover,

has not stated that she will not enforce the Act. *See Am. Booksellers Ass'n*, 484 U.S. at 393 ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well founded fear that the law will be enforced against them."). A lack of enforcement history is not a compelling reason to find Appellants' claims unripe in this context.[4] The Act did not go into effect until January 1, 2016, approximately one month before the district court denied the motion for a preliminary injunction. Appellants, therefore, could not have demonstrated a significant history of enforcement. *See Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (affording the factor of past prosecution "little weight" when the challenged law was new); *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("[E]nforcement history alone is not dispositive. Courts have found standing where no one had ever been prosecuted under the challenged provision.").

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[4] Moreover, we note that NIFLA filed a 28(j) letter informing the Court that, on August 16, 2016, Los Angeles City Attorney Michael Feuer sent an enforcement letter to co-counsel for NIFLA. In the letter, the City Attorney provided notice that The People of the State of California planned to make an *ex parte* application for an order to show cause why a preliminary injunction should not issue and a temporary restraining order enjoining the Pregnancy Counseling Center, a member of NIFLA, from violating the FACT Act. The City indicated it also would file a complaint containing a single cause of action—violation of California Business & Professions Code § 17200, *et seq.*—and seeking equitable relief and civil penalties. NIFLA states this chilled the speech of the Pregnancy Counseling Center.

B. Appellants' Claims Are Prudentially Ripe.

Even if a case is constitutionally ripe, we have discretionary power to decline to exercise jurisdiction. *Thomas*, 220 F.3d at 1142. When assessing prudential ripeness, we consider: (1) the fitness of the issues for judicial decision and; (2) hardship to the parties if we were to withhold jurisdiction. *Id.* at 1141.

This Court has stated that "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson*, 616 F.3d at 1060 (quoting *U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). When evaluating hardship "[w]e consider whether the 'regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance.'" *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting *Ass'n of Am. Med. Colls.* v. *United States*, 217 F.3d 770, 783 (9th Cir. 2000)). "[A] litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Id.* (quoting *MFS Intelenet, Inc.*, 193 F.3d at 1118).

We conclude that both factors favor a finding of prudential ripeness.

This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge. The district court's order denying the

motion for a preliminary injunction was also an appealable order. 28 U.S.C. § 1292(a)(1).

We also conclude that the parties would face immediate and significant hardships if we were to decline to exercise jurisdiction. Until we issue a decision, Appellants must routinely choose between holding fast to their firmly held beliefs about abortion, or complying with the Act. And although the San Diego County Counsel claims that he will suffer hardship if he is forced to defend the Act, we find more significant the definite and direct hardship that all parties will suffer if we were to decline to find jurisdiction. As noted, without a decision, Appellants must continually choose between obeying the law or following their strongly held convictions about abortion, and the AG will have to choose whether or not to enforce a law without the benefit of a ruling on its constitutionality.

We therefore conclude that this action is justiciable and turn to the merits of the case.

I. The District Court Did Not Abuse Its Discretion in Denying the Preliminary Injunction.

When bringing a motion for a preliminary injunction, a plaintiff must demonstrate: (1) that he is likely to succeed on the merits of his claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. A preliminary injunction can also be issued if "a plaintiff

demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as well as satisfaction of the other *Winter* factors. *All. for the Wild Rockies*, 632 F.3d at 1134–35 (citation omitted).

A. Appellants Cannot Demonstrate a Likelihood of Success on their First Amendment Free Speech Claims.

Appellants argue that the Act should be subject to strict scrutiny for two main reasons. First, they argue that because the Act compels content-based speech, strict scrutiny is appropriate. Second, they contend that the Act engages in viewpoint discrimination.

We disagree. Although the Act is a content-based regulation, it does not discriminate based on viewpoint. The fact that the Act regulates content, moreover, does not compel us to apply strict scrutiny. And because we agree with the Fourth Circuit that the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), did not announce a rule regarding the level of scrutiny to apply in abortion-related disclosure cases, we apply our precedent in *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2013), and rule that the Licensed Notice regulates professional speech, subject to intermediate scrutiny.[5] The Licensed Notice survives

[5] We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review. *See Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Commercial speech "does no more than propose a commercial transaction." *Coyote Pub., Inc.* v. *Miller*, 598 F.3d 592, 604 (9th Cir. 2010) (citation omitted).

intermediate scrutiny. We also conclude that the Unlicensed Notice survives any level of scrutiny. Thus, the district court did not err in finding that Appellants cannot show a likelihood of success on the merits of their free speech claims.

1. Strict Scrutiny Is Inappropriate.

A regulation discriminates based on content when "on its face," the regulation "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A regulation discriminates based on viewpoint when it regulates speech "based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Id.* at 2230 (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Thus, viewpoint discrimination is a kind of content discrimination. Indeed, viewpoint discrimination is a "'more blatant' and 'egregious form of content discrimination.'" *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

Because viewpoint discrimination is a subset of content discrimination, a regulation can be content-based, but viewpoint neutral. Such is the case with the Act.

On its face, the Act compels Appellants to disseminate the Notices. *See id.* at 2228 (explaining that the "first step" in assessing whether a law is content-based or content-neutral is to "determine[ ] whether the law is content neutral on its face"). The

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The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.

Act therefore requires Appellants engage in speech on a particular subject matter. In so doing, the Act "[m]andat[es] speech that a speaker would not otherwise make" which "necessarily alters the content of the speech." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Act, therefore, is a content-based regulation.[6]

The Act, however, does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services. The Act contains two narrow exceptions that do not disfavor any particular speakers. The first exemption is for clinics "directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies." Cal. Health & Safety Code § 123471(c)(1). This exemption was created in order to avoid federal preemption. The Act's second exemption is for a clinic "enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program." *Id.* § 123472(c)(2). This exemption was created because clinics that fall under § 123472(c)(2) already provide all of the publicly-funded health services outlined in the Licensed Notice.

Appellants argue that this case is similar to *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), in

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[6] We disagree with the district court's conclusion that the Act is content-neutral. This error, however, was harmless as it appropriately denied the motion for a preliminary injunction.

which the Supreme Court held that a law restricting the sale and use of pharmacy records discriminated based on viewpoint and was subject to more rigorous judicial scrutiny. There, the Court looked to the law's legislative findings and concluded that the law's "express purpose" was to burden specific speakers. *Id.* at 565. Appellants assert that because the California legislature also had specific speakers in mind when enacting the Act, that is, CPCs and clinics opposed to abortion, the Act engages in viewpoint discrimination. Appellants emphasize, moreover, that California has no evidence that their clinics actually misinform women.

Sorrell, however, did not rely solely on legislative intent. The Court concluded that the law "on its face burden[ed] disfavored speech by disfavored speakers," allowing use of the pharmacy records by all "but a narrow class of disfavored speakers." *Id.* at 564, 573. Thus, while "a statute's stated purpose may also be considered," Sorrell did not turn exclusively on the law's motivation or purpose. *Id.* at 565. Importantly, the law in *Sorrell* applied to the speakers that were the targets of the law, while it exempted others. In sharp contrast, as discussed, the Act applies to almost all licensed and unlicensed speakers. Other than the two narrow exceptions unrelated to viewpoint, the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services.

Appellants' reliance on *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), is also misplaced. In Conant, we affirmed an injunction that prohibited the federal government from possibly revoking a doctor's license

based on a federal policy that "not merely prohibit[ed] the discussion of marijuana," but also "condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id.* at 637.

Conant is distinguishable. Again, other than the two exceptions, the Act applies to all clinics, regardless of their stance on abortion or contraception. Next, unlike in *Conant*, the Act does not favor or disfavor any particular viewpoint. Indeed, contrasting this case with the Fourth Circuit's recent decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), confirms that the Act does not engage in viewpoint discrimination. In Stuart, the Fourth Circuit held that a statute that required doctors to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions violated the physicians' First Amendment rights. 774 F.3d at 255–56. In so doing, the Fourth Circuit concluded that the law compelled speech that "convey[ed] a particular opinion," which was, "to convince women seeking abortions to change their minds or reassess their decisions." *Id.* at 246. Here, however, the Act does not convey any opinion. The Licensed Notice and the Unlicensed Notice do not imply or suggest any preference regarding family planning services. Instead, the Licensed Notice merely states the existence of publicly-funded family-planning services, and the Unlicensed Notice only states that the particular clinic in which it is distributed is not licensed.

We conclude that the Act is content-based, but does not discriminate based on viewpoint.

i. Even Though the Act Engages in Content Based Discrimination, Strict Scrutiny Is Inappropriate.

In arguing that content-based regulations are always subject to strict scrutiny, Appellants cite the Supreme Court's recent decision in *Reed*. In *Reed*, the Supreme Court held that a town's regulation of the manner in which outdoor signs were displayed was content-based and unable to satisfy strict scrutiny. 135 S. Ct. at 2227, 2231. In reaching this conclusion, the Court expressly stated that "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

Reed, however, does not require us to apply strict scrutiny in this case. Since *Reed*, we have recognized that not all content-based regulations merit strict scrutiny. See *United States* v. *Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc) (discussing *Reed* and noting examples that illustrate that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny").

Further, the Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion. In *Casey*, the Supreme Court considered Pennsylvania's requirement that a physician provide abortion-related information to his or her patient, writing:

> All that is left of petitioners' argument is an asserted First Amendment right of a

> physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

505 U.S. at 884 (citations omitted) (emphasis added). Over a decade later, in *Gonzales* v. *Carhart*, the Court wrote that "the State has a significant role to play in regulating the medical profession." 550 U.S. 124, 157 (2007).

In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart*, 774 F.3d at 248–49 (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs.* v. *Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (applying a reasonableness test).

Thus, Appellants' argument that the Act, a content-based regulation, must be subject to strict scrutiny is unpersuasive. We have recognized that not all content-based regulations are subject to strict scrutiny, and courts have routinely applied a lower

level of scrutiny when states have compelled speech concerning abortion-related disclosures.

ii. *Casey* Did Not Announce a Rule Regarding the Level of Scrutiny to Apply to Abortion Related Disclosure Cases.

Although courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases, there is currently a circuit split regarding the appropriate level of scrutiny to apply. In interpreting *Casey* and *Gonzales*, and in particular the above quoted excerpt from *Casey*, the Fifth and Eighth Circuits have applied a "reasonableness" test when determining whether an abortion-related disclosure law violated physicians' First Amendment rights. In *Lakey*, the Fifth Circuit held that the appropriate level of scrutiny for abortion-related disclosures was "the antithesis of strict scrutiny," upholding a law requiring doctors to show pregnant women sonograms of their fetuses and make audible the fetuses' heartbeats. 667 F.3d at 575. The *Lakey* court interpreted *Casey* and *Gonzales* to mean that such laws were permissible as they "are part of the state's reasonable regulation of medical practice." Id. at 576. Similarly, in construing *Casey* and *Gonzales*, the Eighth Circuit upheld a law regulating informed consent to abortion, concluding that a state "can use its regulatory authority to require a physician to provide truthful, non-misleading information" to patients in the context of abortion-related disclosures. *Rounds*, 530 F.3d at 734–35.

The Fourth Circuit, however, disagreed that *Casey* created an entirely new standard to apply in abortion-related disclosure cases. In *Stuart*, the Fourth Circuit concluded that "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech[.]" 774 F.3d at 249. The court also noted that *Gonzales* did not shed light on the First Amendment standard post-*Casey*, since *Gonzales* was not a First Amendment case. *Id.* Thus, the court assessed a law requiring doctors to perform an ultrasound, sonogram, and describe the fetus to pregnant patients under a professional speech framework. *Id.* at 247–48, 252, 256. The court concluded that intermediate scrutiny was the appropriate standard and that the law failed this level of scrutiny. *Id.* Applying intermediate scrutiny, the court explained, was "consistent with Supreme Court precedent and appropriately recognizes the intersection . . . of regulation of speech and regulation of the medical profession in the context of an abortion procedure." *Id.* at 249.

We agree with the Fourth Circuit that *Casey* did not establish a level of scrutiny to apply in abortion-related disclosure cases. *Casey's* short discussion of a physician's First Amendment rights in the context of abortion means only what it says—that there was no violation of the physicians' First Amendment rights given the particular facts of *Casey*. *See* 505 U.S. at 884 ("We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." (emphasis

added)). We need not "read too much," *Stuart*, 774 F.3d at 249, into *Casey's* statement that physicians are "subject to reasonable licensing and regulation by the State." 505 U.S. at 884. *Casey* did not announce an entirely new rule with this limited statement. *See Stuart*, 774 F.3d at 249 ("That particularized finding [in *Casey*] hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion."). Nor did it render inapplicable other frameworks for assessing free speech claims when the speech at issue concerns abortion. Instead, what *Casey* did was merely confirm what we have always known, which is that professionals are subject to reasonable licensing by the state. *See, e.g., Dent v. W. Va.*, 129 U.S. 114, 122 (1889) (examining a law regulating the medical profession and writing that "[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud").

We also agree with the Fourth Circuit that *Gonzales* did not clearly speak to the level of scrutiny to apply to physician's First Amendment rights. *See Stuart*, 774 F.3d at 249 ("The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment.").

We rule that strict scrutiny is inappropriate, and that *Casey* did not announce a level of scrutiny to apply in abortion-related disclosure cases.

2. The Licensed Notice Is Professional Speech Subject to Intermediate Scrutiny.

In *Pickup*, we assessed the level of scrutiny to apply to Senate Bill 1172, a California law that banned mental health therapists from conducting on minor patients any practice that purported to change a patient's sexual orientation. 740 F.3d at 1221. We explained that the level of protection to apply to specific instances of professional speech or conduct is best understood as along a continuum. At one end is a professional's right to engage in a "public dialogue, [where] First Amendment protection is at its greatest." *Id.* at 1227. There, "[professionals] are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection[.]" *Id.* at 1227–28. On the other end lies professional conduct, where the speech at issue is, for example, a form of treatment. *Id.* at 1229. When regulating conduct, "the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* Because the law in *Pickup* involved the regulation of a specific type of therapy, we held that it regulated professional conduct subject to rational basis review. *Id.* at 1231.

Pickup also delineated professional speech that falls in the middle of the continuum. At the midpoint, "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it" because "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to

public debate." *Id.* at 1228. *Pickup*, however, never discussed the level of scrutiny appropriate for speech that fell at the midpoint.

We conclude that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply.

To begin, the Licensed Notice regulates professional speech. Underlying the *Pickup* opinion is the principle that professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice. *See King* v. *Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014) ("[W]e conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as *part of the practice of her profession.*" (emphasis added)). The idea that the speech that occurs between a professional and a client is distinct from other types of speech stems from the belief that professionals, "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not" and that clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity." *Id.*; see also *Lowe* v. *SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in

the practice of a profession."). This is why states have the power to regulate professions, *see, e.g.*, *Barsky* v. *Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 449 (1954) ("The state's discretion . . . extends naturally to the regulation of all professions concerned with health."), as well as the power to regulate the speech that occurs within the practice of the profession.

Licensed clinics engage in speech that occurs squarely within the confines of their professional practice. For example, Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. Thus, a regular client of Pregnancy Care could easily use many of their services throughout the stages of her pregnancy, such as receiving educational information about best health practices when pregnant, relying upon Pregnancy Care for regular check-ups, or using Pregnancy Care as a resource for counseling. In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family planning services. There is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.

The professional nature of their speech does not change even if Appellants decide to have staff members disseminate the Licensed Notice in the

clinics' waiting rooms, instead of by doctors or nurses in the examining room. Here, the professional nature of the licensed clinics' relationship with their clients extends beyond the examining room. All the speech related to the clinics' professional services that occurs within the clinics' walls, including within in the waiting room, is part of the clinics' professional practice. Furthermore, the Licensed Notice contains information regarding the professional services offered by the clinics, and thus would constitute professional speech regardless of where within the clinic it was disseminated.

We now turn to the correct level of scrutiny to apply to the Licensed Notice and conclude that under our precedent in *Pickup*, intermediate scrutiny applies. Licensed Clinics are not engaging in a public dialogue when treating their clients, and they are not "constitutionally equivalent to soapbox orators and pamphleteers." *Pickup*, 740 F.3d at 1227. Thus, it would be inappropriate to apply strict scrutiny. And, unlike in *Pickup*, the Licensed Notice does not regulate therapy, treatment, medication, or any other type of conduct. Instead, the Licensed Notice regulates the clinics' speech in the context of medical treatment, counseling, or advertising.[7]

Because the speech here falls at the midpoint of the *Pickup* continuum, it is not afforded the "greatest" First Amendment protection, nor the least. *Id.* It

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[7] We disagree with the district court's conclusion that the Act regulates conduct. The district court's error, however, was harmless as it appropriately denied the motion for a preliminary injunction.

follows, therefore, that speech in the middle of the *Pickup* continuum should be subject to intermediate scrutiny. *See Stuart*, 774 F.3d at 249 (applying intermediate scrutiny when physicians challenged an abortion-related disclosure law they claimed violated their First Amendment rights); *King*, 767 F.3d at 237 (applying intermediate scrutiny when therapists challenged a law prohibiting therapy that purported to change patients' sexual-orientation, which it had determined was professional "speech" rather than "conduct"). Applying intermediate scrutiny is consistent with the principle that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished," *Pickup*, 740 F.3d at 1228, but that professionals also do not "simply abandon their First Amendment rights when they commence practicing a profession." *Stuart*, 774 F.3d at 247.

Appellants cite *In Re Primus*, 436 U.S. 412 (1978), to argue that strict scrutiny should apply to professional speech when the professional services at issue are offered free of charge. We reject this argument.[8] *In In re Primus*, the Supreme Court addressed whether a lawyer's First Amendment rights were violated when a state bar punished her

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[8] We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech. *But see Moore-King* v. *Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." (emphasis added)).

for writing a letter to a possible client about free legal services available at the American Civil Liberties Union, an organization with which she was affiliated, but offered her no compensation. 436 U.S. at 414–15. The Supreme Court held that the lawyer's constitutional rights were violated, writing that "[i]n the context of political expression and association . . . a State must regulate with significantly greater precision." *Id.* at 437–38. Here, however, Appellants have positioned themselves in the marketplace as pregnancy clinics. Their non-profit status does not change the fact that they offer medical services in a professional context. Nor does their non-profit status transform them into, for example, an organization that engages in "political expression and association." *Id.*

3. The Licensed Notice Survives Intermediate Scrutiny.

In order to survive intermediate scrutiny, "the State must show . . . that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Intermediate scrutiny is "demanding" but requires less than strict scrutiny. *Retail Digital Network, LLC* v. *Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016). "What is required is 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Id.* at 649 (quoting

Bd. of Trustees of the State Univ. of N.Y. v. *Fox*, 492 U.S. 469, 480 (1989)).

We conclude that the Licensed Notice satisfies intermediate scrutiny. California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion. The California Legislature determined that a substantial number of California citizens may not be aware of, or have access to, medical services relevant to pregnancy. *See* Assem. Bill No. 775 § 1(b). This includes findings that in 2012, 2.6 million California women were in need of publicly-funded family planning services, and that thousands of pregnant California women remain unaware of the state-funded programs that offer an array of services, such as health education and planning, prenatal care, and abortion. *Id.* As we have long recognized, "[s]tates have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for . . . regulating the practice of professions." *Am. Acad. of Pain Mgmt.* v. *Joseph*, 353 F.3d 1099, 1109 (9th Cir. 2004) (quoting *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625 (1994)).

We conclude that the Licensed Notice is narrowly drawn to achieve California's substantial interests. The Notice informs the reader only of the existence of publicly-funded family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services. The Licensed Notice is

closely drawn to achieve California's interests in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services. And given that many of the choices facing pregnant women are time-sensitive, such as a woman's right to have an abortion before viability, *Casey*, 505 U.S. at 846, we find convincing the AG's argument that because the Licensed Notice is disseminated directly to patients whenever they enter a clinic, it is an effective means of informing women about publicly-funded pregnancy services.

Appellants argue that because California could find other ways to disseminate the information in the Licensed Notice to the public, such as in an advertising campaign, the Act cannot survive heightened scrutiny. The Second and Fourth Circuits used similar reasoning to strike down provisions of abortion-related regulations. *See Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 250 (2d Cir. 2014) (stating that "the City can communicate this message through an advertising campaign");*Centro Tepeyac* v. *Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (stating that the government had "several options less restrictive than compelled speech" such as "launch[ing] a public awareness campaign" (internal quotation marks and citation omitted)).

But *Evergreen* and *Centro Tepeyac* applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today. Unlike when evaluating a law under strict scrutiny, under intermediate scrutiny, a law need not be the least restrictive means possible. *See Appelsmith*, 810 F.3d at 649. Thus, even if it were true that the state could

disseminate this information through other means, it need not prove that the Act is the least restrictive means possible.[9]

Further, unlike the portions of the regulations before the Second and Fourth Circuits, the Licensed Notice does not use the word "encourage," or other language that suggests the California Legislature's preferences regarding prenatal care. *See Evergreen*, 740 F.3d at 250 (striking down the portion of the regulation that required clinics to state that "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider"); *Centro Tepeyac*, 722 F.3d at 191 (striking the portion of the regulation that mandated clinics to state that "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider").

4. The Unlicensed Notice Survives Any Level of Review.

We now address the speech regulated by the Unlicensed Notice. While we acknowledge that unlicensed clinics do not offer many of the medical

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[9] We note that, given the preliminary stage of this case, it is unclear whether California actually could have disseminated this information as effectively in an advertising campaign, as Appellants argue. At oral argument, the AG noted that California has advertised its publicly-funded programs, but many women were still unaware of their existence given the expansion of certain health programs. Oral Argument at 28:44, A *Woman's Friend Pregnancy Resource Clinic* v. *Harris*, No. 15-17517, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009827.

services available at licensed clinics, they nonetheless offer some professional services. Fallbrook Pregnancy Center, for example, offers educational programs. They also give medical referrals for ultrasounds and sonographs, which are offered nearby. Indeed, the Act covers unlicensed clinics like Fallbrook precisely because their "primary purpose is [to provide] pregnancy-related services" and those services can include collecting health information, offering prenatal care, or pregnancy tests and diagnosis. Cal. Health & Safety Code § 123471(b).

We need not resolve the question, however, of whether the Unlicensed Notice regulates professional speech because it is clear to us that the Unlicensed Notice will survive even strict scrutiny.

In order to survive strict scrutiny, a regulation must be "narrowly tailored to serve a compelling interest." *Williams Yulee* v. *Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

California has a compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state. And given the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services, California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling.

We conclude that the Unlicensed Notice is narrowly tailored to this compelling interest. By

stating that the clinic in which it is disseminated is not licensed by the State of California, the Unlicensed Notice helps ensure that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state. The Unlicensed Notice is also only one sentence long. It merely states that the facility in which it appears is not licensed by California and has no state-licensed medical provider. It says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics.

The Second and Fourth Circuits held that regulations with provisions similar to the Unlicensed Notice survived strict scrutiny. In *Evergreen*, the Second Circuit concluded that the portion of the regulation that required clinics to state if they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services" survived strict scrutiny because it was not overly broad, and was "the least restrictive means to ensure that a woman [was] aware of whether or not a *particular* pregnancy services center ha[d] a licensed medical provider." 740 F.3d at 246–47 (emphasis in original). Similarly, in *Centro Tepeyac*, the Fourth Circuit held that the portion of the regulation that stated "the Center does not have a licensed medical professional on staff," survived strict scrutiny because it "merely notifie[d] patients that a licensed medical professional [was] not on staff, d[id] not require any other specific message, and in neutral language

state[d] the truth." 722 F.3d at 190 (internal quotation marks and citation omitted). The surviving portions of the regulations in *Evergreen* and *Centro Tepeyac* merely state whether or not the clinics had licensed providers, which is exactly what the Unlicensed Notice does.

We therefore hold that the district court did not abuse its discretion in finding that Appellants cannot demonstrate a likelihood of success on their free speech claim. The Licensed Notice regulates professional speech, subject to intermediate scrutiny, which it survives. The Unlicensed Notice survives any level of review.[10]

B. Appellants Cannot Demonstrate a Likelihood of Success on their First Amendment Free Exercise Claim.

Courts have long recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Empl't Div., Dep't. of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990) (quoting *United States* v. *Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). A neutral and generally applicable law is subject to only rational basis review. *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1075–76 (9th Cir. 2015).

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[10] To be clear, we do not conclude that strict scrutiny is the correct level of scrutiny to apply to the Unlicensed Notice. We only conclude that it can survive strict scrutiny.

The Act is facially neutral. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 1076 (citation omitted). The Act references no religious practice and is thus facially neutral.

The Act is also operationally neutral. It "prescribe[s] and proscribe[s] the same conduct for all, regardless of motivation." *Id.* at 1077. The Act applies to all covered facilities, and is indifferent to the basis for any objection. Thus, contrary to Appellants' assertion, this case is distinguishable from *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*. There, the Supreme Court found non-neutral a law that banned animal sacrifices for only a particular religion while sacrifices "that [were] no more necessary or humane in almost all other circumstances [went] unpunished." 508 U.S. 520, 536 (1993). But, unlike in *Lukumi*, the Act applies to all licensed and unlicensed facilities, regardless of any objection, religious or otherwise. The fact that Appellants' objections are grounded in their religious beliefs does not affect the Act's neutrality. *See Stormans,* 794 F.3d at 1077 ("The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.").

The Act is generally applicable. "[I]f a law pursues the government's interest only against conduct motivated by religious belief but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Id.* at 1079 (internal quotation marks and citation

omitted). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief[.]" *Lukumi*, 508 U.S. at 543.

The Act has two exemptions, and neither renders the Act not generally applicable. As noted, the Act's first exemption exists to avoid federal preemption, and its second exemption is for clinics that already provide all of the publicly-funded services outlined in the Act. *See supra* section II.A.1. Because the Act's exemptions are "tied directly to limited, particularized, business-related, objective criteria," the Act is generally applicable. *Stormans*, 794 F.3d at 1082.

And finally, this action is not a "hybrid-rights" case in which a free exercise plaintiff has made out a "colorable claim that a companion right has been violated." *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). Appellants have not shown a likelihood of success on the merits of their free speech claim. Thus, there is no "colorable claim" for "a companion right." *Id.*

We conclude that the Act is a neutral law of general applicability, subject to only rational basis review. *See Stormans*, 794 F.3d at 1075–76. Because the Licensed Notice survives intermediate scrutiny, and the Unlicensed Notice survives any level of

review, the Act necessarily also survives rational basis review.[11]

CONCLUSION

Appellants have failed to demonstrate that the first, most important, *Winter* factor favors granting their motion for a preliminary injunction. *Garcia*, 786 F.3d at 740. We reject Appellants' arguments that they are entitled to a preliminary injunction based on their free speech claims. The Act is a content-based regulation that does not discriminate based on viewpoint. And because *Casey* did not announce a new rule regarding the level of scrutiny to apply to abortion-related disclosure cases, we apply this Court's professional speech framework and conclude that the Licensed Notice is subject to intermediate scrutiny, which it survives. The Unlicensed Notice survives any level of review.

We also reject Appellants' arguments that they are entitled to a preliminary injunction based on their free exercise claims. The Act is a neutral law of general applicability, which survives rational basis review. Appellants, therefore, are unable to

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[11] We also find that Appellants have not raised "serious questions" going to the merits of their claims; thus, the alternate test set forth in Alliance *for the Wild Rockies* does not apply. The district court's conclusion that there were serious questions going to the merits was harmless error because the district court appropriately denied the motion for a preliminary injunction. Because Appellants cannot show a likelihood of success on the merits or "serious questions" going to the merits of their First Amendment claims, we need not discuss the remaining *Winter* factors.

demonstrate likelihood of success on the merits of their First Amendment claims.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

National Institute of Family and Life Advocates, a Virginia corporation, DBA NIFLA; PREGNANCY CARE CENTER, a California corporation, DBA Pregnancy Care Clinic; FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation, *Plaintiffs*, v. Kamala Harris, *et. al.*, *Defendants.*	Civil No. 15-cv-2277-JAH(DHB) **ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Doc. No.3]**

INTRODUCTION

Currently pending before this Court is the motion for preliminary injunction filed by Plaintiffs National Institute of Family and Life Advocates d/b/a NIFLA ("NIFLA"), Pregnancy Care Center d/b/a Pregnancy Care Clinic, and Fallbrook Pregnancy Resource Center (collectively "Plaintiffs"). The parties fully briefed the motion and appeared before this Court for hearing on the motion on January 28, 2016. After a thorough review of the parties' submissions,

consideration of the argument presented at the hearing and for the reasons discussed below, the Court DENIES Plaintiffs' motion for a preliminary injunction.

BACKGROUND

The plaintiffs in this case are two non-profit pro-life pregnancy centers located in this judicial district and one national network of similar centers. Plaintiffs filed the instant complaint on October 13, 2015, against Defendants Kamala Harris, in her official capacity as Attorney General for the State of California ("Harris") and Edmund D. Brown, in his official capacity as Governor of the State of California ("Brown")(collectively "the State Defendants"), Thomas Montgomery in his official capacity as County Counsel for San Diego County ("the County Defendant"), and Morgan Foley, in his official capacity as attorney for the City of El Cajon ("the City Defendant"). They allege Plaintiffs will be subject to various civil rights violations when California Assembly Bill 775, known as "the Reproductive FACT Act" ("the Act"), which was signed into law on October 9, 2015, becomes effective.[1] The Act imposes two professional notice requirements on clinics that provide pregnancy-related services such as Plaintiffs. The first applies to any clinic that is a "licensed covered facility" and the second applies to any "unlicensed covered facility." Cal. Health & Safety Code § 123471(a) & (b).

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[1] The Act became effective on January 1, 2016, after the filing of the complaint and the pending motion, but prior to the hearing on Plaintiff's motion for a preliminary injunction.

Section 123471(a) requires licensed covered facilities to provide the following notice:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]. Cal. H&S § 123471(a)(1). This notice must be either posted at the facility, printed for distribution to clients, or provided digitally to be read by clients upon arrival.

Cal. Health & Safety Code §§ 123472(a)(2)(A)-(C).

Section 123471(a) also requires unlicensed covered facilities to clearly and conspicuously "disseminate to clients on site and in any print and digital advertising materials including Internet Web sites" the following notice:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

Cal. Health & Safety Code § 123472(b)(2)-(3).

Facilities covered under the Act that fail to comply with these requirements "are liable for a civil penalty of five hundred dollars ($500) for the first offense and one thousand ($1,000) for each subsequent offense." Cal. Health & Safety § 123473(a). The prosecuting authority, including the Attorney General, city attorney or counsel, "may bring an action to impose a civil penalty" but only if both of the following has been done:

> (1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.
>
> (2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

Cal. Health & Safety Code § 123473(a)(1)-(2).

Plaintiffs filed the instant motion for preliminary injunction on October 21, 2015. Defendants filed their oppositions to the motion on November 13, 20152, and Plaintiffs filed a combined reply brief on November 20, 2015.[2] Plaintiffs filed a notice of supplemental

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[2] The State Defendants filed objections to certain allegations of the complaint. Because Plaintiffs did not provide any declarations in support of their motion, the Court reviewed the complaint during its analysis of the relevant documents submitted by the parties. The Court made its assessment as the relevancy and credibility of the allegations contained therein, and determined how much weight to provide to those it deemed

authority on January 8, 2016. The parties appeared before this Court for a hearing on the motion on January 28, 2016.

DISCUSSION

I. Legal Standard

A party seeking injunctive relief under Federal Rule of Civil Procedure 65 must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998). "'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'" Roe, 134 F.3d at 1402 (citing United States v. Nutricology, Inc., 982 F.2d 394, 397 (9th Cir. 1992)). "[T]he greater the relative hardship to the moving party, the less probability of success must be shown." National Ctr. for Immigrants Rights v. INS, 743 F.2d 1365,1369 (9th Cir. 1984). "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988)).

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relevant in reaching its decision. Accordingly, the objections are overruled as moot.

II. Analysis

Plaintiffs, who are entities that offer free information and services to women to "empower them to make choices other than abortion," argue "their right to freedom of speech and religion will be violated when the Act becomes effective because it forces them to recite government messages promoting abortion and deterring women from speaking with them." Motion at 1 (Doc. No. 3-1). Plaintiffs contend these potential violations require this Court to enter a preliminary injunction enjoining the enforcement of the Act until such time as Plaintiffs' claims can be adjudicated.

A. Likelihood of Success on the Merits

Plaintiffs contend they have demonstrated a likelihood of success on the merits of their First Amendment free speech and free exercise of religion claims because the Act, by definition, impacts Plaintiffs' rights and fails to survive strict scrutiny.

In opposition, all Defendants separately contend no preliminary injunction should issue because Plaintiffs' claims are not ripe for review. The State Defendants also contend Plaintiffs fail to demonstrate a likelihood of success on the merits of either of their First Amendment claims. Further, the City Defendant argues, in addition to an "as applied" challenge and facial challenge both failing for no injury in fact and therefore not ripe for review, a facial

challenge against him also fails because he did not write or enact the Act.[3]

1. Ripeness

All Defendants contend Plaintiffs cannot demonstrate a likelihood of success on the merits of their First Amendment claims on the grounds the claims are not ripe for review. A federal court's judicial power is limited to "cases" or "controversies." U.S. Const., Art. III § 2. A necessary element of Article III's "case" or "controversy" requirement is that a litigant must have "'standing' to challenge the

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[3] The State Defendants also argue the complaint is unverified and, therefore, the motion is unsupported by any evidence. They contend Plaintiffs' verifications which include a qualification that the declarant is testifying to the truth of the allegations to the best of his/her knowledge nullifies the evidentiary value of the complaint. Plaintiffs argue the case the State Defendants rely on in support of this argument was reversed on appeal and multiple other courts find "to the best of my knowledge" complies with the requirements of 28 U.S.C. section 1746. Section 1746 calls for, in any matter required to be supported by evidence or proved by sworn declaration and verification, may be established by declaration "in substantially the following form: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." Plaintiffs submit no declarations in support of their motion. Instead, they rely on the allegations of their complaint which provides the following verification, "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge." Complaint at 34. Although the verification is not precisely as presented in section 1746, Plaintiffs declare under penalty of perjury the allegations are true. Accordingly, the Court finds Plaintiffs' verification sufficiently complies with section 1746. See Schroeder v. McDonald, 55 F.3d 454, 460 n. 10 (9th Cir. 1995).

action sought to be adjudicated in the lawsuit." Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000). The "irreducible constitutional minimum" of Article III standing has three elements. LSO, 205 F.3d at 1152 (internal quotations omitted). First, the plaintiff must have suffered "an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)(internal citations and quotations omitted). Second, the plaintiff must show a causal connection between the injury and the conduct complained of; i.e., "the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Id. (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976))(alterations in original). Third, it must be "likely," and not merely "speculative," that the plaintiff's injury will be redressed by a favorable decision. Id. at 561.

The Ninth Circuit has found that "ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (citations omitted). In addition, in the Ninth Circuit, a plaintiff must "articulate a concrete plan to engage in conduct subject to the law" in order to pass Constitutional muster. Lopez v. Candaele, 630 F.3d

775, 787 (9th Cir. 2010). However, the Ninth Circuit has also found that "where protected speech may be at stake, a plaintiff need not risk prosecution in order to challenge a statute." Wolfson v. Brammer, 616 F.3d 1045, 1059-60 (9th Cir. 2010); see also Bland v. Fessler, 88 F.3d 729, 736-37 (9th Cir. 1996).

The County Defendant argues the instant complaint fails to allege a genuine threat of imminent prosecution, in that it fails to allege a "concrete plan" to violate the Act, and does not allege Defendants warned or threatened to file a civil enforcement against Plaintiffs. The County Defendant also argues Plaintiffs cannot be harmed by the mandatory disclosures if they do not make them.

The City Defendant agrees. In addition, the City Defendant argues Plaintiffs cannot demonstrate a likelihood of success on the merits on either an "as applied" basis or on a "facial challenge" to the constitutionality of the Act. The City Defendant maintain Plaintiffs do not allege an injury due to any application of the Act and, thus, any "as applied" challenge fails.

The State Defendants argue Plaintiffs fail to meet both the constitutional and prudential components of the judicial ripeness determination. Specifically, as to the constitutional considerations, the State Defendants contend Plaintiffs fail to show they face a realistic danger of sustaining a direct injury because Plaintiffs fail to identify any actual or credible threat of enforcement by any of the defendants. The State Defendants further argue Plaintiffs' "scattershot naming of defendants" belies their claim of injury

because, if there was a credible threat, Plaintiffs would know who to sue instead of "casting such wide net to catch all potential defendants." State Defendants' Opp. at 12 (Doc. No. 23).

In regards to prudential considerations, the State Defendants contend "there is a dearth of facts for this Court to analyze," rendering this case not fit for judicial review until discovery has been done. Id. In addition, the State Defendants contend Plaintiffs will suffer no hardship if the Court does not grant the preliminary injunction since the Act requires a 30-day period before any Defendant could bring an action to impose a civil penalty for failure to comply. The State Defendants claim the issues in this case echo the prudential concerns in Thomas, in which the Ninth Circuit found the case devoid of facts and therefore not ripe for review.

Lastly, the State Defendants argue Plaintiffs also fail to establish associational standing as alleged in the complaint, which the State Defendants explain is often intertwined with ripeness. They maintain there is insufficient evidence in the record to determine if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." State Def's Opp. at 14 (quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

In reply, Plaintiffs argue First Amendment precedent shows that in a free speech challenge, they

need not wait until the police issue a warning or citation before they can challenge a law. Plaintiffs contend the Thomas case is inapposite because it involved a law that prohibited landlords from discriminating against non-married applicants but the plaintiffs had no such applicants and could not predict when such applicants might apply, thus providing good reason for finding no "concrete plan." Here, however, Plaintiffs argue the opposite is true, in that the only precondition was the January 1, 2016 effective date of the statute. Plaintiffs contend the complaint contains allegations showing they intend to engage in pregnancy-related speech as they have done in the past and that, alone, will be in violation of the Act.

Plaintiffs further argue they plead a desire to do what the Act bans just as in Wolfson which they maintain provides the correct application of the "concrete plan" issue.

Plaintiffs disagree with Defendants' interpretation of the Act as not requiring disclosures until a warning is given, claiming such interpretation is false. Although Plaintiffs admit the imposition of fines only occur after a warning is given, Plaintiffs maintain the failure to make disclosures are still illegal independent of the fines. Plaintiffs contend that "[r]ecently enacted statutes impose a presumably reasonable fear of prosecution" and the Court should "'relax the requirements of standing and ripeness' so that a plaintiff 'need not await prosecution to seek preventative relief.'" Plas' Reply at 5 (Doc. No. 30) (quoting Wolfson, 616 F.3d at 1060).

Plaintiffs argue prudential standing exists because the Act, by its terms, "'requires an immediate and significant change in Plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." Id. at 5-6 (quoting Wolfson, 616 F.3d at 1060). Plaintiffs further argue no factual issues need be developed because the Act will stand or fall primarily based on its language and the government's justification, not enforcement.

As indicated by the parties, the Act became effective January 1, 2016. Plaintiffs express their desire not to utter the disclosures required by the Act which they allege are detrimental to their mission and undermine "the content, context and tone of the viewpoint that they wish to deliver to their pro-life messages." Complaint ¶¶ 121, 122, 131. They express their intention "to not comply with the Act" for those reasons. Id. ¶123. The Court finds Plaintiffs present a concrete plan to violate the act.

While no one has threatened to institute enforcement proceedings against Plaintiffs for their failure to comply with the Act, Defendants do not suggest the Act will not be enforced. Plaintiffs sufficiently allege a "credible threat of prosecution" for failure to comply with the Act. See Lopez, 630 F.3d at 785.

The Court also finds based upon Plaintiffs' clear intention not to comply with the Act due to their mission and pro-life views and the text of the Act, the record provides sufficient factual context to support their position that the action is ripe for judicial review.

2. Merits of Plaintiffs' Claims

The State Defendants also contend Plaintiffs fail to demonstrate a likelihood of success on the merits on each of Plaintiffs' First Amendment claims.

Additionally, the City Defendant argues an facial challenge to the Act fails against him because he did not draft or enact the Act.

a. The State Defendants

i. Free Speech Claim

The State Defendants argue there is no likelihood Plaintiffs will succeed on their free speech claim as to the two notice requirements applicable to licensed and unlicensed facilities.

A. Licensed Facilities

The State Defendants argue the notice requirement for licensed facilities regulates conduct, not speech. Relying on the holding in Pickup v. Brown, the State Defendants contend the activities at issue here concern the delivery of pregnancy-related health care services and do not concern expressive activity. 740 F.3d 1208 (9th Cir. 2013). They claim the required disclosure at issue "involves a limited informational disclosure within the context of providing those professional services" and does not prohibit Plaintiffs "'from imparting information or disseminating opinions.'" State Defs' Response at 16 (quoting Pickup, 740 F.3d at 1230). The State Defendants point out the statute does not prohibit a center from mentioning, discussing or advocating its

pro-life viewpoint or even communicating its disagreement with the statute itself. Thus, the State Defendants contend, because the Act regulates conduct, it is subject only to rational basis review.

Even if the notice requirements are considered compelled speech rather than conduct, the State Defendants argue they concern commercial speech subject to rational basis review. According to the State Defendants, it is often difficult to distinguish between commercial and non-commercial speech. They maintain discovery on the precise nature of the transactions at Plaintiffs' pregnancy centers will further inform the Court but, even at this early stage of the proceedings, it is clear the speech at issue here involves commercial speech. Id.

The State Defendants dispute Plaintiffs' argument against any commercial speech analysis, which is based on Plaintiffs' non-profit status. They argue, even if true, lack of profit is not relevant to the determination of whether speech is commercial or non-commercial. The State Defendants further argue the lack of funds exchange does not render speech non-commercial because the provision of goods and services of value is sufficient to be considered commercial.

The State Defendants maintain the notice requirement in this case for licensed facilities contain only pure factual and incontrovertible information that simply provides notice about the full spectrum of pregnancy-related public health services and a phone number for further information. They argue the required disclosure is informational and, thus, is

objective and akin to other commercial disclosures upheld by the courts as meeting constitutional muster. Therefore, they maintain, only rational basis review is required here.

Relying on Planned Parenthood of Southeastern Pa. v. Casey, the State Defendants further argue, even if the Court finds the speech at issue is not commercial speech subject to rational basis review, it should be upheld like other abortion-related disclosures have been. 505 U.S. 833, 882-84 (1992). According to the State Defendants, Casey and its progeny hold the state can use regulatory authority to require physicians to provide information regarding abortion in a non-misleading, truthful way even if the information might encourage the patient to choose something other than abortion.

The State Defendants also argue, even if the Court applies heightened scrutiny, the notice requirement would survive constitutional review. The State Defendants maintain the legislative history indicates the Act was enacted to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them," to support their arguments for the government interests at stake. State Def's Motion at 23 (quoting Assem. Bill No. 775, § 2). They argue the interest becomes more compelling when viewed in light of the history of

"crisis pregnancy centers" as discussed in AB 775's legislative history.[4]

The State Defendants also argue the notice requirement is narrowly tailored to advance the government's interest of insuring women are informed about all their health care options in regards to pregnancy.

In reply, Plaintiffs argue the State Defendants' rationale demonstrates the Act must be subject to strict scrutiny because it is content and viewpoint discrimination. Plaintiffs explain the State defendants admit "the Act's purpose and justification are to target 'crisis pregnancy centers' that 'aim to discourage and prevent women from seeking abortions,' by 'deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women." Plas' Reply at 7 (quoting State Defs' Response at 23). Plaintiffs argue this interpretation is clearly content and viewpoint based, in that the Act aims to counteract the crisis pregnancy centers' pro-life viewpoint. Plaintiffs cite to Sorrell v. IMS Health, Inc., in which the Supreme Court found

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[4] The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care. Assem. Comm. on Health, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April 14, 2015, at 3.

legislative content concerning medical/pharmaceutical regulations confirmed "that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs" and, thus, the Court determined the law went "beyond mere content discrimination, to actual viewpoint discrimination." 131 S.Ct. 2654, 2663-64 (2011). Plaintiffs argue the same conclusion should be made here because the State has openly expressed disagreement with the content of Plaintiffs' speech and directly targeted that viewpoint.

Plaintiffs contend the speech cannot be considered commercial speech because they lack commercial elements as non-profit groups and provide their services and speech for free. They maintain other courts have held pregnancy centers like Plaintiffs are not commercial in nature and thus, not subject to commercial speech regulations.

Plaintiffs further argue the proper inquiry regarding commercial speech is whether there is an actual commercial purpose or sole economic interest for a transaction not whether the services have value. Plaintiffs assert they have no such purpose and disagree with the State Defendants' contentions to the contrary.

In addition, Plaintiffs argue the State Defendants misinterpret both Pickup, and Casey. They maintain Pickup banned treatment, not speech as in this case, and Casey involved "informed consent" which is not at issue here. Lastly, Plaintiffs argue the Act fails not

only strict scrutiny but also fails intermediate scrutiny as commercial speech.

The Court must first determine whether the Act, which concerns patient and medical provider relationships, regulates conduct or speech and finds the reasoning in Pickup crucial to this determination. In Pickup, the Ninth Circuit viewed the issue of regulation of a professional's conduct and speech along a continuum. 740 F.3d at 1227. It recognized at one end of the continuum, a professional engaged in a public dialogue is entitled to the greatest First Amendment protection. Id. At the midpoint of the continuum, First Amendment protection of a professional's speech within the confines of the professional relationship is somewhat diminished. Id. at 1228. At the other end of the continuum, the court recognized the state's power to regulate professional conduct is great. Id. at 1229.

The Act does not ban speech or otherwise prohibit Plaintiffs from discussing their message with patients. Instead, the Act requires medical providers to advise their patients of various types of treatment available so patients are fully informed when making decisions regarding their pregnancies. Similar to the regulation in Pickup, the Act permits discussion about treatment and expressing opinions including their messages regarding abortion. The Court finds the providers' action in informing patients of their treatment options is professional conduct subject to rational basis review. Id. at 1231. The state clearly has a legitimate interest in ensuring pregnant woman are fully advised of their rights and treatment options when making reproductive health care decisions and

the required disclosure is undeniably rationally related to that interest.

Even if speech is implicated, the Court finds the Act regulates professional speech. Under the Act, licensed facilities are required to make a disclosure when providing pregnancy related services to patients. A licensed facility is defined as a facility "whose primary purpose is providing family planning or pregnancy-related services and that satisfies two or more of the following:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
>
> (3) The facility offers pregnancy testing or pregnancy diagnosis.
>
> (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> (5) The facility offers abortion services.(6) The facility has staff or volunteers who collect health information from clients."

Cal. Health & Safety Code § 123471 (a)

The Act clearly addresses the medical provider-patient relationship, and is therefore, properly classified as professional speech. See Wollschlaeger v. Governor of the State of California, -- F.3d --, 2015 WL 8639875 (11th Cir. 2015). This Court disagrees with Plaintiffs that this case differs from Casey because it does not involve informed consent. In Casey, the United States Supreme Court upheld a Pennsylvania statute requiring physicians performing abortions make certain disclosures regarding the nature of the procedure, the availability of printed materials describing the unborn child and include a list of agencies offering alternatives to abortion, among other things. 404 U.S. at 882-84. The plurality in Casey explained:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated [internal citations omitted], but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State [citation omitted]. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Id. at 884.

As evidenced by the legislative history, the purpose of the Act's disclosure requirement is to ensure pregnant women receive non-misleading information so they are fully-informed when making decisions regarding critical health care. As such, the Court finds if the disclosure required by the Act is considered speech, it is professional speech.

The court in Pickup recognized "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it." 740 F.3d at 1228. Because it ultimately found the regulation at issue in Pickup, regulated conduct, the court did not discuss the proper level of scrutiny for professional speech. However, the court did recognized the protection afforded professional speech was diminished. See id. This suggests intermediate scrutiny is the proper level of scrutiny for professional speech.

The Court finds the Act survives intermediate scrutiny. The Act's disclosure requirement directly advances the government's substantial interest in ensuring pregnant women are fully advised of their rights and available services when making reproductive health care decisions. Additionally, the statute is not a broad, content-based restriction of speech. To the contrary, the required notice is neutral as to any particular view or opinion and merely provides information regarding the various health care options available. Further, the Act does not preclude Plaintiff from providing all manner of beneficial advice, including alternatives to abortion. Nor does the Act express a particular view or make a

recommendation and, as such is not more than necessary to serve the state's interest. Importantly, the Act does not preclude Plaintiffs from openly expressing disagreement with the required disclosure.

Therefore, Plaintiffs fail to demonstrate a likelihood of success on the merits of their free speech claim with respect to the licensed facilities notice requirement.

B. Unlicensed Facilities

The State Defendants also argue the notice requirement applicable to unlicensed facilities meets constitutional muster. As with the licensed facilities' notice requirement, the State Defendants maintain the requirement requires only rational basis review because it "simply directs unlicensed covered facilities to disseminate to 'clients on site' and in any 'advertising materials' a short, neutral statement advising of its status as a facility not licensed as a medical facility by the State of California." State Def's Opp. at 26. (quoting Cal. Health & Safety Code § 123472(b)(1)). The State Defendants contend the notice requirement in this case is similar to those upheld by the Second Circuit in Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233, (2d Cir.), *cert.* denied sub nom., 135 S.Ct. 435 (2014), and the Fourth Circuit in Centro Tepeyac v. Montgomery Cnty., 722

F.3d 184, 189-90 (4th Cir. 2013), and argue it likewise withstands any level of scrutiny, even strict scrutiny.[5]

Plaintiffs argue, to the extent Evergreen held a disclosure required unlicensed facilities to declare they do not have medical providers survives strict scrutiny, the holding is not persuasive.

The Court agrees the notice requirement for unlicensed facilities withstands any level of scrutiny. The state's interest in ensuring pregnant women know when they are receiving medical care from licensed professions and when they are not is compelling. Further, the Act which merely requires a notice that a facility is not licensed and has no licensed medical provider on staff is narrowly tailored

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[5] In Evergreen, the Second Circuit found the disclosure to be the "least restrictive means to ensure that a woman is aware of whether or not a particular pregnancy services center has a licensed medical provider at the time that she first interacts with it. 740 F.3d at 246. Such law is required to ensure that women have prompt access to the type of care they seek." Id. at 247. The Evergreen court also explained that the alternative measures suggested by the plaintiffs, such as, City-sponsored advertisements and signs posted outside of the centers "will not accomplish the City's compelling interest." Id. In addition, the court rejected the argument that the statute is over-inclusive because not all pregnancy centers engage in deception. Id.

The Fourth Circuit, in Centro Tepeyac, concluded the district court properly refused to preliminarily enjoin enforcement of a county ordinance requiring pregnancy centers post a sign stating no licensed medical professional was on staff. 722 F.3d at189-90. The Court concluded the district court properly found the requirement served the county's compelling interest in "preserving public health" and was narrowly tailored to meet that interest. Id. at 190.

to achieve that compelling interest. Accordingly, Plaintiffs fail to demonstrate a likelihood of success on the merits of their free speech claim as to the unlicensed facilities notice requirement.

ii. Free Exercise of Religion Claim

The State Defendants argue Plaintiffs' free exercise of religion claim lacks merit because "the requirements of the Act 'appl[y] throughout the [State of California], and there is not even a hint that [Plaintiffs were] targeted on the basis of religion for varying treatment' in the application of the law.'" State Def's Opp. at 30 (quoting San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004). They maintain this conclusion is apparent from the plain text and legislative history of the Act. Therefore, they argue, the burden on Plaintiffs' free exercise of religion does not violate the First Amendment.

Plaintiffs do not address Defendants' contentions in reply.

The Free Exercise Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940),"forbids all laws 'prohibiting the free exercise' of religion." McDaniel v. Paty, 435 U.S. 618, 620 (1978) (quoting U.S. Const. amend. I). Laws that are neutral and of general applicability "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508

U.S. 520, 531 (1993) (quoting Employment Division, Department of Human Resources of Ore. v. Smith, 494 U.S. 872, 879 (1990)). The rational basis test applies to laws meeting the neutral and general applicability criteria. See Miller v. Reed, 176 F,3d 1202, 1206 (9th Cir. 1999). "A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Church of Lukumi, 508 U.S. at 531 - 32. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral...." Id. at 533, 113 S.Ct. 2217. A law is not generally applicable if it, "in a selective manner [,] impose[s] burdens only on conduct motivated by religious belief." Id. at 543.

The object of the Act is to ensure pregnant women are fully informed of their health care options and when they are obtaining treatment from licensed providers. Thus, the Act is neutral. Additionally, the Act is generally applicable. While clinics operated by the United States and clinics enrolled as a Medi-Cal provider and a provider in the Family Planning, Access Care and Treatment Program are exempt from the licensed facility required notice because they already provide the entire spectrum of services required of the notice, in that Plaintiffs contend discovery is not necessary to rule on the instant motion, this Court finds there is no evidence to suggest the Act burdens only conduct motivated by religious belief.

As discussed in detail above, the Court finds the Act survives not only rational basis but strict scrutiny review. Accordingly, Plaintiffs fail to demonstrate a

likelihood of success on the merits of their free exercise claim.

b. The City Defendant

The City Defendant argues any facial challenge cannot be brought against him because he did not draft or enact the Act. This Court agrees. As such, Plaintiff fails to show a likelihood of success on any facial challenge against the City Defendant.

Although the Court finds Plaintiffs fail to demonstrate a likelihood of success on the merits of their claims, the Court finds serious questions are raised. Therefore, this Court must address the balance of hardships. See Anderson, 134 F.3d at 1402.

B. Irreparable Harm, Balance of Hardships and Public Interest

Plaintiffs argue they clearly will suffer irreparable harm absent an injunction because any loss of a constitutional right is presumed to be irreparable injury. They further argue the balance of hardships tips in their favor because their free speech and free exercise rights will be burdened if an injunction does not issue. They maintain the State will suffer little if any harm because it could serve its interests by other means. Plaintiff also contend the public interest is served by an injunction because "free speech serves societal interests. . . by protecting those who wish to enter the marketplace of ideas from government attack." Plas' Motion at 25 (quoting Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986)).

The County Defendant argues Plaintiffs fail to show irreparable harm because a civil enforcement action can only be filed against Plaintiffs 30 days after a notice of noncompliance is filed and no notice has been issued. Additionally, the County Defendant maintains Plaintiffs' argument that any loss of a constitutional right is presumed to be irreparable injury fails because Plaintiffs allege they intend not to comply with the Act, and therefore, cannot be harmed by the mandatory disclosures they do not make.

The State Defendants argue Plaintiffs fail to meet their burden of demonstrating irreparable injury because their constitutional claim is unsupported and fails as a matter of law. They also argue if this Court enjoins the Act it will harm millions of California women who are in need of publicly funded family planning services, education, support and prenatal care, but are unaware of the programs and services available. They further argue an injunction will also prevent pregnant women in California from knowing when they are getting medical care from licensed professionals. The State Defendants also maintain Plaintiffs will remain free, if the Act is not enjoined, to advance their pro-life viewpoint because nothing in the Act prohibits such expression.

The City Defendant argues because there are no allegations that the City Defendant issued a specific

warning or threat to initiate proceedings against Plaintiffs, they fail to show irreparable injury.[6]

The Court finds Plaintiff fails to demonstrate irreparable harm. They rely on the violation of their First Amendment rights to support irreparable harm, but, as discussed in detail above, Plaintiff fail to support their argument of a constitutional violation. Additionally, the Court finds the balance of hardships tips in favor of the state, city and county and the interest in protecting its citizens. Finally, public policy favors denial of the motion for preliminary injunction.

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED Plaintiff's motion for a preliminary injunction is **DENIED.**

Dated: February 8, 2016

JOHN A. HOUSTON
United States
District Judge

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[6] In addition, the City Defendant argues there is no history of enforcement because the Act has yet to be effective to render Plaintiffs' fear of prosecution reasonable. In that the Act is now effective, this argument is moot.

Filed: December 20, 2016

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, a Virginia corporation; et al., Plaintiffs-Appellants, v. KAMALA HARRIS, in her official capacity as Attorney General for the State of California; et al., Defendants-Appellees.	No. 16-55249 D.C. No. 3:15-cv-02277-JAH-DHB Southern District of California, San Diego ORDER

Before: D.W. NELSON, TASHIMA, and OWENS, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Owens voted to deny the petition for rehearing en banc. Judge Nelson and Judge Tashima recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are DENIED.

Relevant Constitutional Provisions

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Assembly Bill No. 775

CHAPTER 700

An act to add Article 2.7 (commencing with Section 123470) to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, relating to public health.

[Approved by Governor October 9, 2015. Filed with Secretary of State October 9, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 775, Chiu. Reproductive FACT Act.

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined, or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized.

This bill would enact the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which would require a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women. The bill would also require an

unlicensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that the facility is not licensed as a medical facility by the State of California.

The bill would authorize the Attorney General, city attorney, or county counsel to bring an action to impose a specified civil penalty against covered facilities that fail to comply with these requirements.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women. Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands

of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or

obtaining care, that these facilities are not licensed to provide medical care.

SEC. 2. The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

SEC. 3. Article 2.7 (commencing with Section 123470) is added to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, to read:

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility offers pregnancy testing or pregnancy diagnosis.

(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:

(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.

(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

123472. (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state:

"California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

(2) The information shall be disclosed in one of the following ways:

(A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.

(B) A printed notice distributed to all clients in no less than 14-point type.

(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous"

means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.

(2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held

invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, a Virginia corporation; **PREGNANCY CARE CENTER, d/b/a PREGNANCY CARE CLINIC**, a California corporation; **FALLBROOK PREGNANCY RESOURCE CENTER**, a California corporation; **Plaintiffs,** **v.**	Case No. **'15CV2277 JAH DHB** **VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF**

KAMALA HARRIS, in her official capacity as Attorney General for the State of California; **THOMAS MONTGOMERY**, in his official capacity as County Counsel for San Diego County; **MORGAN FOLEY**, in his official capacity as City Attorney for the City of El Cajon, CA; and **EDMUND G. BROWN, JR.**, in his official capacity as Governor of the State of California;

Defendants.

Come now the Plaintiffs, by and through their attorneys, and for their causes of action against Defendants aver the following:

INTRODUCTION

1. This case is a federal civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of California Assembly Bill 775, the Reproductive FACT Act (hereinafter the "Act"), which was signed by California Governor Edmund Gerald Brown on October 9, 2015. A copy of the Act is attached hereto as Exhibit A.

2. Plaintiffs are a national non-profit pro-life membership organization with 111 affiliates in

California, and two of those affiliates in San Diego County. They seek to provide help and pro-life information to women in unplanned pregnancies so that they will be supported in choosing to give birth, and practical medical or non-medical support free of charge in support of Plaintiffs' pro-life viewpoint.

3. The Act, however, imposes government compelled speech upon the Plaintiff pregnancy centers due to their support for pregnant women, and in ways that undermine the centers' messages.

4. It requires licensed medical pregnancy centers such as Plaintiff Pregnancy Care Clinic (PCC) and other similar members of Plaintiff National Institute of Family and Life Advocates (NIFLA) to post a disclosure saying the State of California provides free or low-cost abortion and contraception services and providing a phone number to refer or arrange for such services.

5. The Act also requires unlicensed non-medical pregnancy centers, such as Plaintiff Fallbrook Pregnancy Resource Center (Fallbrook) and other similar NIFLA members, to post disclaimers within their facilities and in all their advertising materials negatively emphasizing that they do not have a licensed medical provider on staff.

6. Such disclaimers must be posted merely because the Plaintiffs serve pregnant women, and not with any prerequisite that a center has engaged in improper behavior or has suggested they have a licensed medical provider.

7. The Act is therefore unconstitutional under the First Amendment to the United States Constitution. It is a classic example of compelled speech in violation of the Free Speech Clause. The law is expressly content-based both because it compels the content of speech and because it regulates only speakers who wish to discuss the subject of pregnancy rather than any other health topic. The law is also viewpoint based for forcing licensed facilities to promote abortion, and by exempting facilities that offer certain family planning or Medi-Cal services. For similar reasons the Act violates the free speech clause of the California Constitution, Art. I, Sec. 2(a).

8. The law is also impermissibly vague under the Due Process Clause of the Fourteenth Amendment with respect to various terms applicable to unlicensed centers.

9. The Act also violates federal statutory law, the Coats-Snowe Amendment, 42 U.S.C. § 238n, that protects licensed health care entities from being required to refer for abortion or make arrangements for such referrals.

10. Accordingly, preliminary and permanent injunctive and declaratory relief against the Act are warranted.

11. PCC and Fallbrook are directly regulated by the Act.

12. NIFLA asserts organizational standing on behalf of its California members, which are licensed or unlicensed centers throughout the State of

California that, just like PCC and Fallbrook, the Act regulates and compels to speak in violation of their views and mission. As discussed below, NIFLA's claims fit comfortably within the Supreme Court's organizational standing to allow it to obtain judicial relief for its members.

13. The Act goes into effect January 1, 2016.

14. Therefore preliminary injunctive relief is needed before that date in order to prevent irreparable harm to the rights of Plaintiffs and NIFLA's California members.

JURISDICTION AND VENUE

15. This Court has jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1343. This Court has authority to grant the requested injunctive relief under 28 U.S.C. § 1343; the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202; and costs and attorneys fees under 42 U.S.C.§ 1988(b). This Court has supplemental jurisdiction over the Plaintiffs' claim under the free speech clause of the California Constitution pursuant to 28 U.S.C.§ 1367.

16. Venue lies in the Federal District Court for the Southern District of California pursuant to 28 U.S.C. § 1391(b). A substantial part of the actions or omissions giving rise to this case occurred within the District, and at least one Defendant resides in this District.

IDENTIFICATION OF THE PARTIES

Plaintiffs

17. Plaintiff National Institute of Family and Life Advocates is a religious not-for-profit corporation duly incorporated under the laws of Virginia, with its principal place of business at 5610 Southpoint Ctr. Blvd., #103, Fredericksburg, VA 22407.

18. It is comprised of member pregnancy centers from across the nation, including 111 in the state of California, that provide medical or non-medical information and services without charge to their clients, and are therefore regulated by the Act.

19. Seventy-three of NIFLA's California members provide licensed medical services, while thirty-eight provide only non-medical services.

20. Plaintiff Pregnancy Care Clinic is a religious not-for-profit corporation duly incorporated under the laws of California, with its principal place of business at 677 S. Magnolia Avenue, El Cajon, CA, 92020.

21. It provides pregnancy-related licensed medical as well as nonmedical information and services without charge to its clients under the supervision of its executive director, Josh McClure, and in furtherance of its religious beliefs.

22. Plaintiff Fallbrook Pregnancy Center is a religious not-for-profit corporation duly incorporated under the laws of California, with its principal place of business at 113 E. Hawthorne Street, Fallbrook, CA 92028, where it provides pregnancy-related non-

medical information and services without charge to its clients under the supervision of its executive director, Carolyn Koole, and in furtherance of its religious beliefs.

Defendants

23. Defendant Kamala Harris is the Attorney General for the State of California and is sued in her official capacity. She is responsible under the Act for enforcing its provisions against entities in violation thereof including the Plaintiffs and NIFLA's California Members.

24. Defendant Thomas Montgomery is the County Counsel for San Diego County, California and is sued in his official capacity. He is responsible under the Act for enforcing its provisions against entities in violation thereof in San Diego County, including the Plaintiff facilities and NIFLA's California Members in San Diego County.

25. Defendant Morgan Foley is the City Attorney for City of El Cajon, California and is sued in his official capacity. He is responsible under the Act for enforcing its provisions against entities in violation thereof in El Cajon, including the Plaintiff facilities and NIFLA's California Members in El Cajon.

26. Defendant Edmund G. Brown, Jr., is the Governor of the State of California, and is sued in his official capacity. He is the chief executive of the State of California and is responsible for funds that the state has received from the federal government subjecting it to 42 U.S.C. § 238n.

FACTUAL ALLEGATIONS

27. Plaintiffs provide compassionate and loving information and services to serve the medical, emotional, and material needs of women who face unplanned pregnancies to help them choose birth for their children.

Pregnancy Care Clinic

28. Pregnancy Care Clinic (hereinafter "PCC") exists to serve women and their unborn children.

29. PCC provides both medical and non-medical pro-life information and services for no charge to women in unplanned pregnancies as a licensed primary care provider.

30. PCC is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory.

31. PCC operates as a medically licensed primary care center in the State of California.

32. PCC provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion.

33. Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider consultation, and other clinical services.

34. The medical team at PCC consists of two Obstetrician/Gynecologists, one Radiologist, one Anesthesiologist, one Certified Nurse Midwife, one Nurse Practitioner, ten Nurses, and two Registered Diagnostic Medical Sonographers.

35. Non-medical services provided by PCC include: peer counseling and education, emotional support, maternity clothes, baby supplies, support groups, and healthy family support.

36. PCC is a religious organization and pursues its pro-life message and activities as an exercise of its religious belief is a gift of God that should not be destroyed by abortion.

Fallbrook Pregnancy Center

37. Fallbrook Pregnancy Center (hereinafter "Fallbrook") provides nonmedical services for no charge to women in unplanned pregnancies in furtherance of its pro-life viewpoint.

38. Fallbrook provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothes, and baby items.

39. Fallbrook contracts with a separate organization that is a licensed medical provider of ultrasound services. Fallbrook refers women to that provider's separate mobile facility located nearby.

40. Fallbrook is a religious organization and pursues its pro-life message and activities as an

exercise of its religious belief that human life is a gift of God that should not be destroyed by abortion.

National Institute of Family and Life Advocates

41. NIFLA is a non-profit membership organization comprised of a network of both medical and non-medical centers providing pro-life information services to women in unplanned pregnancies.

42. NIFLA is incorporated as a religious organization.

43. NIFLA provides both medical and non-medical pro-life pregnancy centers with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America.

44. NIFLA's mission is to empower the choice for life by: equipping pregnancy centers with legal counsel and support; enabling pregnancy centers to convert to medical clinic status; and energizing pregnancy centers with a renewed vision for the future.

45. NIFLA has 111 members in California.

46. Seventy-three of NIFLA's California members are properly licensed to provide medical services, in situations similar to PCC.

47. Thirty-eight of NIFLA's California members are not medically licensed and therefore provide only non-medical services, similar to Fallbrook.

48. Most of NIFLA's California members are religious organizations that pursue their pro-life message and activities as an exercise of their religious beliefs.

49. NIFLA's own religious mission includes helping those members advance their religious beliefs.

50. NIFLA's California members are regulated under the Act as either medical centers or non-medical centers.

51. NIFLA's California members are subject to the Act's compelled speech requirements.

52. NIFLA has organizational standing to represent all of its member pregnancy centers, both licensed and unlicensed, from the State of California. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988).

53. The members of NIFLA would otherwise have standing to sue in their own right in this case.

54. The interests that NIFLA seeks to protect are germane to NIFLA's purpose, including the purpose to support its pro-life pregnancy center members and enable them to carry out their missions consistent with their pro-life and religious viewpoints.

55. Neither the claims asserted nor the relief requested requires participation of all of NIFLA's individual members in this suit, but can be awarded to NIFLA's members as a group.

Assembly Bill 775, the Reproductive FACT Act

56. The Legislature indicates that the purpose of the Act "is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Exhibit A.

57. The Act defines "licensed covered facility" as a

> facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility provides, or offers counseling about, contraception or contraceptive methods; (3) The facility offers pregnancy testing or pregnancy diagnosis; (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests,

> or pregnancy options counseling; (5) The facility offers abortion services; (6) The facility has staff or volunteers who collect health information from clients.

Id.

58. The Act mandates that a licensed covered facility to "disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.*

59. The required notice for licensed covered facilities must state the following: "California has public programs that provide immediate free or low cost access to comprehensive family planning services (including all FDA approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.*

60. The notice must be displayed in one of the following ways: (A) A public notice placed in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type; (B) A printed notice distributed to all clients in no less than 14-point type; or (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in

subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in digital format. *Id.*

61. Upon information and belief, county social services in California provide or refer women for abortions.

62. Therefore the Act requires "licensed covered facilities" to provide referrals for abortion and/or arrange for referrals for abortion by requiring such centers to provide contact information for the local county social services to all clients so that they may procure an abortion.

63. PCC and NIFLA's licensed medical pregnancy center members meet the definition of licensed covered facilities for the purpose of the Act.

64. PCC is a facility licensed as a primary care clinic under Section 1204.

65. PCC's primary purpose is providing pregnancy-related information and services.

66. PCC offers obstetric ultrasounds or obstetric sonograms to pregnant women.

67. PCC offers pregnancy testing or pregnancy diagnosis.

68. PCC advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

69. PCC has staff or volunteers who collect health information from clients.

70. NIFLA's licensed medical facility members meet the Act's definition of "licensed covered facility" for reasons substantially similar to PCC.

71. PCC and NIFLA's licensed medical pregnancy center members are subject to the Act's required disclosures as a "licensed covered facility."

72. The Act defines "unlicensed covered facility" as a

> facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility offers pregnancy testing or pregnancy diagnosis; (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (4) The facility has staff or volunteer who collect health information from clients.

Id.

73. An unlicensed covered facility "shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, [a notice] in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.*

74. The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.*

75. The onsite notice must be "at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.*

76. The notice in the advertising material must be "clear and conspicuous. 'Clear and conspicuous' means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." *Id.*

77. The Act does not define "digital advertising materials" beyond saying it includes "Internet Web Sites."

78. The Act is vague about what kinds of materials count as "digital advertising materials"

because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

79. Advertisements placed on "Internet Web Sites" have limits on their size, such as in the number of characters that can be used.

80. For example, Google limits the number of characters posted in a headline, URL, or description line.

81. Inserting the disclosures into Plaintiffs' advertisements would severely restrict, or preclude altogether, the space and number of characters they could use to recite their own messages in some advertisements placed on "Internet Web Sites."

82. Fallbrook, and NIFLA's non-medical pregnancy center members in California, appear to qualify as unlicensed covered facilities for the purpose of the Act.

83. Fallbrook is not licensed by the State of California.

84. Fallbrook does not have a licensed medical provider on staff or under contract who provides or directly supervises provision of all its services.

85. Fallbrook has a licensed medical provider under contract to take referrals from Fallbrook of women who want an ultrasound, and then to provide such ultrasounds in a separate nearby mobile facility owned by the contractor.

86. Fallbrook does not contract with licensed medical providers to provide all of "the services" Fallbrook provides, because none of Fallbrook's other services are medical.

87. Fallbrook has a nurse employee and several nurses among its volunteer counselors.

88. Fallbrook's nurses do not provide medical services onsite, but are available to provide information about specific topics such as breastfeeding, diet, or printed brochures that discuss medical studies, or to refer clients to externally provided services.

89. Fallbrook does not itself provide obstetric ultrasounds or obstetric sonograms.

90. Fallbrook contracts with an outside provider, which provides ultrasound services in a nearby separate facility.

91. The Act is vague about which "services" Fallbrook's nurses need to "provide[] or directly supervise[]" in order to disqualify Fallbrook from the definition of an "unlicensed covered facility."

92. The Act is vague about whether Fallbrook offers "obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women."

93. Fallbrook does not offer medical prenatal care.

94. Fallbrook offers non-medical care to pregnant women in various forms.

95. Fallbrook does not test bodily fluids to determine pregnancy, nor does it diagnose pregnancy or pregnancy tests.

96. Fallbrook offers free pregnancy test kits that women self-administer and self-diagnose themselves.

97. The Act does not define "offers pregnancy testing or pregnancy diagnosis."

98. The Act is vague about the meaning of "offers pregnancy testing or pregnancy diagnosis" because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

99. Fallbrook advertises that prenatal sonography is available,

100. The sonography that Fallbrook advertises is provided by nearby separate licensed medical provider with whom Fallbrook contracts.

101. Fallbrook advertises that it provides non-medical pregnancy options counseling.

102. Fallbrook advertises that it distributes free pregnancy test kits, which the women self-administer.

103. Fallbrook does not offer to engage in testing or diagnosis of pregnancy.

104. Fallbrook has staff or volunteers who collect information from clients that relates to their possible pregnancies.

105. The Act does not define "health information."

106. The Act is vague about what kind of information constitutes "health information" because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

107. Fallbrook may qualify as an "unlicensed covered facility" under the Act.

108. The Act does not clearly define "unlicensed covered facility."

109. The Act is vague about whether Fallbrook or a similar center qualifies as "unlicensed covered facility" because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

110. Fallbrook has a reasonable fear that it does qualify and is subject to the Act.

111. NIFLA's non-medically licensed members in California may qualify as an "unlicensed covered facility" under the Act.

112. The Act is vague about whether they qualify, for reasons substantially similar to those involving Fallbrook.

113. The Act does not apply to the following: (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies; (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program. *Id.* (hereinafter "the Exemption").

114. Neither PCC, Fallbrook, nor NIFLA's California members are clinics directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies, nor licensed primary care clinics that are enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

115. Upon information and belief, the Act's Exemption, in purpose and effect, applies to facilities which provide abortion services, freeing them from the Act's disclosure requirements, while leaving pro-life facilities subject to them.

116. Covered facilities which fail to comply with the Act are liable for a civil penalty of $500 for a first offense and $1000 for each subsequent offense. *Id.*

117. The Attorney General, city attorney, or county counsel is empowered to bring an action to impose a civil penalty pursuant to the Act after: (1)

"Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility"; and (2) "Verifying that the violation was not corrected" within the 30-day period. *Id.*

118. Fallbrook and NIFLA's non-licensed California members engage in speech, services and advertising that cannot be changed, have disclosures added, or corrected to comply with the Act in less than

30 days after receiving notice of a warning of violation under the Act.

119. The Act compels PCC, Fallbrook, and NIFLA's California members (hereinafter "Plaintiff Facilities") to engage in government-mandated speech.

120. The pregnancy discussions and help provided by Plaintiff Facilities are of an ideologically sensitive nature.

121. Forcing the Act's disclosures on Plaintiff Facilities' speech is detrimental to their mission of counseling and helping women from their viewpoint.

122. Plaintiff Facilities desire not to utter the disclosures required by the Act.

123. Plaintiff Facilities intend to not comply with the Act.

124. Plaintiff Facilities desire to continue engaging in their speech and expressive services while refusing to post, distribute, or otherwise communicate the required compelled statements.

125. Plaintiff Facilities' refusal to comply with the Act would subject them to fines and prosecution by Defendants under the Act.

126. Plaintiff Facilities fear the harms of prosecution under the Act if they fail to comply.

127. Plaintiff Facilities are non-profit organizations with limited funding and relatively small budgets.

128. The Act's penalties would significantly harm Plaintiff Facilities' ability to continue their expressive operations.

129. The Act imposes three untenable choices on Plaintiff Facilities: succumb to their fear of prosecution and comply with the Act in violation of their expressive views and religious beliefs; continue their speech and services without complying with the Act and be prosecuted, penalized, and injured in their ability to pursue their expressive operations; or cease their expressive activities and services altogether.

130. Plaintiffs face a credible threat of adverse state action due to the Act.

131. Requiring Plaintiff Facilities to utter the Act's disclosures forces Plaintiff Facilities to undermine the content, context and tone of the viewpoint that they wish to deliver in their pro-life messages.

132. Requiring the religious Plaintiff Facilities to utter the Act's disclosures imposes a burden on their exercise of their religious beliefs by requiring them to promote abortion and/or to undermine their pro-life message of love and support which they pursue because of their religious beliefs.

133. The Act imposes an impermissible penalty and chill on Plaintiff Facilities' speech, subjecting Plaintiff Facilities to irreparable harm.

134. The Act's regulation of unlicensed facilities imposes penalties on unlicensed Plaintiff Facilities based on vague terms that do not provide adequate notice of whether or how the law applies and what entities must comply.

135. The Act's requirement of "clear and conspicuous" disclosure language on unlicensed Plaintiff Facilities' "digital advertising materials including Internet Web sites" is vague regarding the location and manner in which the disclosures must be placed.

136. The Act's requirement of disclosure language on unlicensed Plaintiff Facilities' advertising materials burdens the size, content, viewpoint and tone of their message.

137. The Act's disclosure requirements for licensed Plaintiff Facilities requires that they "provide referrals for . . . abortions" or "make arrangements" for such referrals, in the meaning of 42 U.S.C. § 238n.

138. The licensed medical Plaintiff Facilities are health care entities protected under 42 U.S.C. § 238n.

139. The health providers in Plaintiff Facilities responsible for compliance with the Act include individual physicians.

140. The State of California receives federal funding including "governmental payments provided as reimbursement for carrying out healthrelated activities" that subject it to 42 U.S.C. § 238n.

141. 42 U.S.C. § 238n is an "Act of Congress providing for the protection of civil rights" belonging to the Plaintiff Facilities, under 28 U.S.C. § 1343.

142. Licensed Plaintiff Facilities have both individual rights under 42 U.S.C. § 238n and remedies under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 to bring this action for the violation of their rights under 42 U.S.C. § 238n.

143. Enforcement of the Act will irreparably harm Plaintiff Facilities by infringing upon their First Amendment rights to free speech and religious exercise; the Fourteenth Amendment right to due process for the unlicensed facilities and freedom from uncabined government discretion; and the individual rights contained in 42 U.S.C. § 238n for the licensed facilities.

144. Defendants are vested with enforcing the Act against Plaintiff Facilities.

145. Passage of the Act into law represents an imminent, concrete and reliable threat that Defendants will enforce the Act against Plaintiff Facilities.

146. Enjoining Defendants from enforcing the Act is necessary to protect Plaintiff Facilities from the chill and punishment imposed on their rights.

147. Each and all of the real and threatened enforcement actions alleged of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color of state law, including the statutes, regulations, customs, policies, and usages of the State of California.

148. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

FIRST CLAIM: VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

149. Paragraphs 1–148 are incorporated as if fully set forth herein.

150. The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

151. The First Amendment is applicable to state and local governments by incorporation in the Fourteenth Amendment.

152. The Act unconstitutionally restricts Plaintiff Facilities' rights of free speech, which includes the right to refrain from speaking, to choose how and when to deliver particular messages, and the right to refuse to speak a government-dictated message.

153. The Act unconstitutionally forces Plaintiff Facilities, on pain of government penalty, to engage in government disclaimers that Plaintiff Facilities would not otherwise recite, that undermine Plaintiff Facilities' message, and that contradict Plaintiff Facilities' viewpoint from which they speak.

154. The Act is unconstitutionally and substantially overbroad.

155. The Act's imposition of disclosures on unlicensed Plaintiff Facilities' advertisements is an unjustified restriction of their ability to advertise their messages.

156. The Act is unconstitutionally underinclusive, because by its Exemption it omits many centers that provide pregnancy related services.

157. The Act imposes an unconstitutional chill and penalty on Plaintiff Facilities' speech, and without declaratory and injunctive relief, will continue to do so.

158. The Act is a content-based regulation of speech.

159. The Act unconstitutionally discriminates against Plaintiff Facilities' speech based on their viewpoint, including because it requires licensed facilities to promote abortion options, and it exempts from the Act's requirements facilities that provide certain family planning or Medi-Cal services.

160. The Act poses an unconstitutional risk of viewpoint discrimination by conferring unfettered

discretion on government officials to interpret the Act's provisions in deciding which unlicensed facilities must comply.

161. The Act is subject to strict scrutiny.

162. The Act does not promote any legitimate, or compelling, government interest, and Defendants lack any evidence or sufficient evidence to demonstrate the existence of such an interest.

163. The Act is not tailored at all, much less narrowly tailored, to further any governmental interest, and it does not do so by a means least restrictive of Plaintiff Facilities' speech.

164. Defendants have ample alternative channels to achieve any alleged interest without imposing the Act's burdens on the speech of Plaintiffs.

165. The Act is an unconstitutional restriction of speech under any standard applicable to the licensed Plaintiff Facilities.

166. The Act is unconstitutional not only as applied to Plaintiff Facilities, but on its face as applied to any facility.

167. Accordingly, the Act violates the First Amendment of the United States Constitution.

168. Therefore, the Act and Defendants' enforcement thereof unconstitutionally infringes on Plaintiffs' rights, thereby entitling Plaintiffs to the relief requested below, pursuant to 42 U.S.C. §1983.

169. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

SECOND CLAIM: VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION; ALLEGED BY THE NON-LICENSED PLAINTIFF FACILITIES

170. Paragraphs 1–148 are incorporated as if fully set forth herein.

171. The Fourteenth Amendment of the United States Constitution's right to due process protects against the government's imposition of penalties such as fines based on vague terms that do not give regulated entities adequate notice of whether or how the law applies and what entities can do to comply.

172. The Act defines "unlicensed covered facility" as a:

> [F]acility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility

> offers pregnancy testing or pregnancy diagnosis; (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (4) The facility has staff or volunteers who collect health information from clients.

Exh. A.

173. The Act's unlicensed facility definition is vague because it does not adequately define: (a) which "services" a nurse or contract medical provider must provide or directly supervise to disqualify a facility from the definition; (b) "directly supervise"; (c) "offers" obstetric ultrasounds, when the ultrasounds are performed separately by a contract licensed provider; (d) "offers pregnancy testing or diagnosis" when the facility distributes pregnancy test kits that women self-administer but the facility does not test or diagnose pregnancy; or (e) "health information."

174. Fallbrook, and NIFLA's unlicensed facility members in California, appear to fit the definition of "unlicensed covered facility," but they cannot know for sure because of the Act's vagueness.

175. The Act by appearance and intent targets pro-life pregnancy centers like Plaintiff Facilities, and therefore they reasonably believe that they fall under the definitions and requirements of the Act, despite its vagueness.

176. This vagueness chills the speech of Fallbrook and the other unlicensed Plaintiff Facilities, who must assume that the Act applies to them and accept the Act's burdens on their speech for fear that the Act's penalties will be applied to them if they do not.

177. The Act's vagueness gives government officials unbridled discretion to determine whether the unlicensed Plaintiff Facilities are covered under the Act or not, implicating the risk of viewpoint discrimination in violation of Fallbrook's and NIFLA's unlicensed members' rights under the Fourteenth Amendment in conjunction with the First Amendment.

178. Accordingly, the Act violates Fallbrook's and NIFLA's unlicensed members' Fourteenth Amendment guarantees of due process.

179. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

THIRD CLAIM: VIOLATION OF THE RIGHTS OF PLAINTIFF FACILITIES UNDER THE FIRST AMENDMENT'S FREE EXERCISE OF RELIGION CLAUSE

180. Paragraphs 1–148 are incorporated as if fully set forth herein.

181. Plaintiff Facilities exercise their religion in their provision of pro-life information and services,

and in the way in which they choose to speak and not speak during the same.

182. Plaintiff Facilities are religious organizations that can and do exercise religion, including in promoting their pro-life message and services.

183. Forcing Plaintiff Facilities to recite the Act's disclosures substantially burdens the exercise of religious beliefs of Plaintiff Facilities, undermining their pro-life message and the way in which they promote that message in pursuit of their religious beliefs.

184. The Act is not neutral or generally applicable, including because it exempts certain facilities that offer particular family planning or Medi-Cal services.

185. Defendants cannot offer sufficient justification to burden Plaintiff Facilities' free exercise of religion by means of the Act.

186. The Act therefore violates Plaintiff Facilities' rights under the Free Exercise of Religion Clause.

187. The Act also violates Plaintiff Facilities' "hybrid" rights under the Free Exercise of Religion Clause in conjunction with their freedom of speech.

188. The First Amendment's Free Exercise of Religion Clause requires the government to satisfy strict scrutiny before it may burden an organization's exercise of religion in conjunction with exercising its rights of speech.

189. The Act infringes on the hybrid of Plaintiffs' Free Exercise of Religion and Free Speech rights.

190. Defendants cannot show a compelling interest for imposing the Act on Plaintiff Facilities, nor can they demonstrate that the Act pursues its goals in a means least restrictive of Plaintiff Facilities' rights.

191. Accordingly, the Act violates the Plaintiff Facilities' First Amendment hybrid rights of Free Exercise of Religion and Free Speech.

192. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

FOURTH CLAIM: VIOLATION OF THE COATS-SNOWE AMENDMENT, 42 U.S.C. §238N, ALLEGED BY THE LICENSED MEDICAL PLAINTIFF FACILITIES

193. Paragraphs 1–148 are incorporated as if fully set forth herein.

194. Defendants violated, and continue to violate, 42 U.S.C. § 238n by requiring licensed pregnancy centers to provide referrals for abortion and/or to make arrangements for referrals for abortion by requiring such licensed centers to provide contact information for the local county social services office in order to procure abortion services.

195. By requiring licensed pregnancy centers to provide contact information to local county social

services offices for abortion services, Defendants have violated Plaintiffs' rights under 42 U.S.C. § 238n.

196. Plaintiffs have suffered and continue to suffer injury and irreparable harm by Defendants' actions, thereby giving rise to the need for injunctive, declaratory and other forms of relief against Defendants.

197. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

FIFTH CLAIM: VIOLATION OF THE FREE SPEECH CLAUSE OF THE CALIFORNIA CONSTITUTION, ART. I, SEC. 2(A). ALLEGED BY ALL PLAINTIFF FACILITIES

198. Paragraphs 1–148 are incorporated as if fully set forth herein.

199. The free speech clause of the California Constitution, Art. I, Sec. 2(a), provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

200. The free speech clause of the California Constitution provides even "broader" and "greater" protections for speech than the First Amendment to the U.S. Constitution. *Gerawan Farming, Inc. v. Lyons*, 101 Cal. Rptr. 2d 470, 486 (Cal. 2000).

201. The Act unconstitutionally restricts Plaintiff Facilities' rights of free speech, which includes the right to refrain from speaking, to choose how and when to deliver particular messages, and the right to refuse to speak a government-dictated message.

202. The Act unconstitutionally forces Plaintiff Facilities, on pain of government penalty, to engage in government disclaimers that Plaintiff Facilities would not otherwise recite, that undermine Plaintiff Facilities' message, and that contradict Plaintiff Facilities' viewpoint from which they speak.

203. The Act is unconstitutionally and substantially overbroad.

204. The Act's imposition of disclosures on unlicensed Plaintiff Facilities' advertisements is an unjustified restriction of their ability to advertise their messages.

205. The Act is unconstitutionally underinclusive, because by its Exemption it omits many centers that provide pregnancy related services.

206. The Act imposes an unconstitutional chill and penalty on Plaintiff Facilities' speech, and without declaratory and injunctive relief, will continue to do so.

207. The Act is a content-based regulation of speech.

208. The Act unconstitutionally discriminates against Plaintiff Facilities' speech based on their viewpoint, including because it requires licensed

facilities to promote abortion options, and it exempts from the Act's requirements facilities that provide certain family planning or Medi-Cal services.

209. The Act poses an unconstitutional risk of viewpoint discrimination by conferring unfettered discretion on government officials to interpret the Act's provisions in deciding which unlicensed facilities must comply.

210. The Act is subject to strict scrutiny.

211. The Act does not promote any legitimate, or compelling, government interest, and Defendants lack any evidence or sufficient evidence to demonstrate the existence of such an interest.

212. The Act is not tailored at all, much less narrowly tailored, to further any governmental interest, and it does not do so by a means least restrictive of Plaintiff Facilities' speech.

213. Defendants have ample alternative channels to achieve any alleged interest without imposing the Act's burdens on the speech of Plaintiffs.

214. The Act is an unconstitutional restriction of speech under any standard applicable to the licensed Plaintiff Facilities.

215. The Act is unconstitutional not only as applied to Plaintiff Facilities, but on its face as applied to any facility.

216. Accordingly, the Act violates the free speech clause of the California Constitution, Art. I, Sec. 2(a).

217. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

A. Declare the Act unconstitutional under the United States and California Constitutions and in violation of federal statute on its face, and as applied to Plaintiffs;

B. Enter preliminary and permanent injunctions against enforcement of the Act;

C. Award Plaintiff the costs of the litigation, including reasonable attorneys' fees and expenses under 42 U.S.C. § 1988;

D. Enter preliminary and permanent injunctions ordering Defendant Brown to disgorge federal funds the State of California has received from United States Department of Health and Human Services and other federal offices in an appropriate amount and in excess of $75,000, penalizing them for the injury they threaten to cause Plaintiffs and others, and prohibiting the receipt of further funding until they have remedied that injury, and until they have brought state law into compliance with 42 U.S.C. § 238n; and

E. Award any and all other relief the Court deems just and proper.

Plaintiffs demand a jury for all issues so triable

Respectfully submitted on this 12th day of October, 2015

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VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Thomas Glessner
THOMAS GLESSNER, J.D.
President
National Institute of Family and Life Advocates

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing *National Institute of Family and Life Advocates v. Harris* complaint is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Josh McClure
JOSH MCCLURE
Executive Director
Pregnancy Care Clinic

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Carolyn Koole
CAROLYN KOOLE
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, et al., Plaintiffs, **v.** **KAMALA HARRIS, in her official capacity as**	Case No. 3:15-cv-02277-JAH-DHB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Carolyn Koole
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
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NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, et al., Plaintiffs, v. **KAMALA HARRIS, in her official capacity as**	Case No. 3:15-cv-02277-JAH-DHB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Attorney General for the State of California, et al., Defendants.	Date: January 11, 2016 Time: 2:30 p.m. Dept.: 13B Judge: John A. Houston Trial Date: None Case Filed: October 13, 2015

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With respect to the governmental interests at stake, AB 775 explains that the Legislature enacted it "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *See* Assem. Bill No. 775, § 2. Even when viewed in isolation, ensuring that pregnant women are fully advised of the range of health care options available to them in California is not only a legitimate state interest, but a compelling one. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."); *Am. Life League, Inc. v. Reno*, 47 F.3d 642,656 (4th Cir. 1995) ("sufficiently compelling governmental interests" exist where law "protects public health by promoting unobstructed access to reproductive health facilities"); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect

the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions").

The interest is even more compelling when viewed in light of the history of 19 so-called "crisis pregnancy centers" in California and across the country, as 20 documented in AB 775's legislative history:

> The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully informed, time-sensitive decisions about critical health care.

Assem. Com. on Health, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April14, 2015, at 3.

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